#### COMMONWEALTH OF MASSACHUSETTS

#### SUPREME JUDICIAL COURT

No. SJC-12559

MATTHEW THEISZ,

PLAINTIFF-APPELLEE,

v.

### MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

DEFENDANT-APPELLANT.

On Appeal from Suffolk Superior Court Under the Doctrine of Present Execution

# OPENING BRIEF OF DEFENDANT-APPELLANT MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

Roberto M. Braceras BBO No. 566816 Sarah K. Frederick BBO No. 679885 GOODWIN PROCTER LLP 100 Northern Avenue Boston, MA 02210

Telephone: (617) 570-1000 Facsimile: (617) 523-1231 rbraceras@goodwinlaw.com sfrederick@goodwinlaw.com

July 25, 2018

(Additional counsel listed on inside cover)

John J. Bonistalli

BBO No. 049129

Scott A. Spencer

BBO No. 678116

Jennifer Lee Sage

BBO No. 677949

Law Offices of John J. Bonistalli

160 Federal Street,

15th Floor

Boston, MA 02110

Telephone: (617) 737-1771

 $\verb|john.bonistalli| @bonistallilaw.com|$ 

 $\verb|scott.spencer@bonistallilaw.com|\\$ 

jennifer.lee@bonistallilaw.com

### TABLE OF CONTENTS

INTRO	DUCT	ION9									
STATE	EMENT	OF ISSUES11									
STATE	EMENT	OF THE CASE12									
SUMMA	ARY OI	F ARGUMENT18									
ARGU	MENT.										
I.	STANI	DARD OF REVIEW19									
II.	THIS COURT HAS JURISDICTION OVER THE MBTA'S APPEAL UNDER THE DOCTRINE OF PRESENT EXECUTION										
III. THE SUPERIOR COURT ERRED IN HOLDING THAT THE MBTA'S ANSWER DID NOT RAISE THE PRESENTMENT DEFENSE WITH SUFFICIENT PARTICULARITY											
	A.	The MBTA provided the notice required by Rule 9(c)27									
	В.	The Superior Court's decision improperly disregarded pleadings that put Plaintiff on notice of defective presentment									
	C.	Rule 9(c)'s answering obligations do not change based on what a plaintiff pleads									
IV.	THE SUPERIOR COURT FURTHER ERRED BY FINDING WAIVER AND FAILING TO GRANT THE MBTA LEAVE TO CORRECT THE PLEADING DEFICIENCY PERCEIVED BY THE COURT										
	A.	Because the presentment bar is an integral part of the MBTA's sovereign immunity, the Superior Court erred in finding waiver without a sufficient legal basis									
	в.	An immediate finding of waiver contravenes the principle that leave to amend is to be freely given44									

	C. The Superior Court's immediate finding of waiver, without an opportunity to amend, frustrated the purpose of the presentment requirement47
	D. Plaintiff waived his Rule 9(c) argument below, further compounding the undue prejudice to the MBTA by not permitting amendment of its answer49
v.	THE SUPERIOR COURT CORRECTLY DETERMINED THAT MR. THEISZ'S PRESENTMENT LETTER FAILED TO ADEQUATELY INFORM THE MBTA ABOUT HIS NEGLIGENCE CLAIM
CONC	LUSION53

### TABLE OF AUTHORITIES

F	age(s)
Cases	
Ball Corp. v. Xidex Corp., 967 F.2d 1440 (10th Cir. 1992)	42
Bellanti v. Boston Pub. Health Comm'n, 70 Mass. App. Ct. 401 (2007)	21
Bldg. Inspector & Zoning Officer of  Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp., 443 Mass. 1 (2004)	41
Brooks v. Monroe Sys. for Bus., Inc., 873 F.2d 202 (8th Cir. 1989)	25
Burks v. City of Philadelphia, 904 F. Supp. 421 (E.D. Pa. 1995)	39
<pre>Coren-Hall v. MBTA, 91 Mass. App. Ct. 77 (2017)</pre>	21
Daveiga v. Boston Pub. Health Comm'n, 449 Mass. 434 (2007)	21
EEOC v. Bo-Cherry, Inc., No. 3:13-cv-00210, 2013 WL 2317724 (W.D.N.C. May 28, 2013)	46
EEOC v. Serv. Temps Inc., 679 F.3d 323 (5th Cir. 2012)	46
Foman v. Davis, 371 U.S. 178 (1962)	50
<pre>Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040 (8th Cir. 2000)</pre>	42
Heights Driving Sch., Inc. v. Top Driver,  Inc., 51 F. App'x 932 (6th Cir. 2002)	36, 37
<pre>Home Depot v. Kardas, 81 Mass. App. Ct. 27 (2011)</pre>	32

Johnston v. Box,
453 Mass. 569 (2009)20
<pre>Knott v. DeKalb Cty. Sch. Sys., No. 1:11-cv-2683-SCJ, 2014 WL 10919525 (N.D. Ga. July 16, 2014)</pre>
Lapides v. Bd. of Regents of Univ.
<u>Sys. of Ga.</u> , 535 U.S. 613 (2002)43
Life Plans, Inc. v. Sec. Life of  Denver Ins. Co., 800 F.3d 343 (7th Cir. 2015)
Manfrates v. Lawrence Plaza Ltd. P'ship, 41 Mass. App. Ct. 409 (1996)50
Martin v. Commonwealth, 53 Mass. App. Ct. 526 (2002)
Martinez v. Waldstein, 89 Mass. App. Ct. 341 (2016)20
McCarthy v. Slade Assocs., Inc., 463 Mass. 181 (2012)
McGrath v. Stanley, 397 Mass. 775 (1986)
Myers v. Central Fla. Invs., Inc., 592 F.3d 1201 (11th Cir. 2010)
Odyssey Reinsurance Co. v. Cal-Regent Ins. Servs. Corp., 123 F. Supp. 3d 343 (D. Conn. 2015)46
Rodriguez v. City of Somerville, 472 Mass. 1008 (2015)passir
Rollins Envt'l Servs., Inc. v.  Superior Court, 368 Mass. 174 (1975)
Rutherford v. City of Portland, 494 A.2d 673 (Me. 1985)
<u>S &amp; M Brands, Inc. v. Cooper</u> , 527 F.3d 500 (6th Cir. 2008)

Salafia v. CNA Ins. Cos.,
2001 Mass. App. Div. 8, 2001 WL 43588
(Jan. 11, 2001)45
Chapiro w City of Wordogtor
Shapiro v. City of Worcester, 464 Mass. 261 (2013)passim
101 Habb. 201 (2013)
Smith v. Wal-Mart Stores,
No. 06-cv-2069, 2006 WL 2711468
(N.D. Cal. Sept. 20, 2006)25
Smith v. Walsh,
No. 2004-2561-F, 2008 WL 7086982
(Mass. Super. Ct. May 9, 2008)41
Tambolleo v. Town of West Boylston,
34 Mass. App. Ct. 526 (1993)15, 51, 52, 53
Taylor v. U.S. Dep't of Labor,
440 F.3d 1 (1st Cir. 2005)
Travers v. Travelers Ins. Co.,
385 Mass. 811 (1982)24, 26, 30
Uncle Henry's Inc. v. Plaut Consulting Inc.,
240 F. Supp. 2d 63 (D. Me. 2003)
TIOTH AND CO. TO A TO
<u>USTrust Co. v. Kennedy</u> , 17 Mass. App. Ct. 131 (1983)49
17 Mass. App. CC. 131 (1903)
Vasys v. Metropolitan District Comm'n,
387 Mass. 51 (1982)
Wester to Commonwealth
Weaver v. Commonwealth, 387 Mass. 43 (1982)
307 Hass. 13 (1302)
Wightman v. Town of Methuen,
26 Mass. App. Ct. 279 (1988)48
Statutes and Rules
M.G.L. c. 2589, 12, 19
Magg D Gir D 0/f)
Mass. R. Civ. P. 8(f)44
Mass. R. Civ. P. 9(c)passim
Mass. R. Civ. P. 12(c)35

Mas	ss.	R.	Civ.	P.	15 (a	)					.11,	16,	44,	49
Ot1	her	Aut	thori	tie	S									
	Fed	lera	l Pr	acti	Wrigh .ce &	Proc	edur	e: C	ivil	§	1302			.24
					e & J ce 8	_								. 25

#### INTRODUCTION

The Massachusetts Tort Claims Act, M.G.L. c. 258, requires a plaintiff first to present any tort claim against a public employer of the Commonwealth to an "executive officer" of that employer before filing a lawsuit. This is so that the officer may determine the legitimacy of the claim and implement any necessary corrective measures prior to incurring the costs of a lawsuit. Because presentment is a prerequisite to the Commonwealth's waiver of its sovereign immunity, courts have demanded "strict compliance" with it, and its absence is fatal to a claim.

The plaintiff, Matthew Theisz, sent a letter to Bay Transportation the Massachusetts Authority ("MBTA") about his intent to bring an assault claim against the MBTA, based on an MBTA driver's alleged assault of a passenger. But assault is an intentional tort for which the Commonwealth has not waived its immunity irrespective of presentment. M.G.L. c. 258, § 10(c). The MBTA analyzed the claim but ultimately did not resolve it. Mr. Theisz then filed a lawsuit alleging the intentional tort, but asserted, for the first time, an additional claim against the MBTA for alleged negligent failure to adequately hire, an

train, and supervise the driver.

The MBTA answered and then moved for judgment on the pleadings, asserting in both pleadings that Mr. Theisz failed to meet Chapter 258's presentment requirement. The Superior Court correctly held that Mr. Theisz failed to present his negligence claim to the MBTA. But the court erred by refusing to give effect to Mr. Theisz's substantive failure. Rather than granting judgment to the MBTA, the court invoked Mass. R. Civ. P. 9(c), under which a defendant must deny the performance or occurrence of a condition precedent "specifically and with particularity." The Theisz's defective presentment court excused Mr. because, in its judgment, the MBTA's answer lacked the specificity that Rule 9(c) demands. As a result, the court held that the MBTA waived its presentment defense and denied the MBTA's motion.

The Superior Court made two key errors, either of which, standing alone, requires reversal. First, the court erred by holding that Rule 9(c)'s requirements were not met by an answer that specified which condition precedent Mr. Theisz did not meet. The MBTA did so by including an unequivocal denial to the allegation that presentment was effected and an

affirmative defense that cited the specific statutory failing at issue. Indeed, the MBTA answered the complaint while Mr. Theisz still had time to correct this deficiency, but he failed to do so.

Second, the Superior Court erred by holding that the MBTA's substantive right to be immune from suit was waived based on a perceived pleading error without allowing the MBTA the opportunity to amend its answer to provide more specificity. Rule 15's directive to "freely" permit amendment of pleadings is only heightened here, as waiver of the Commonwealth's substantive right to be free from suit may not be found absent its express waiver or affirmative litigation conduct sufficient to constitute waiver, neither of which is present here.

#### STATEMENT OF ISSUES

1. Did the Superior Court err in denying the MBTA's motion for judgment on the pleadings on the ground that the MBTA's answer did not deny Mr. Theisz's allegation of satisfying a condition precedent to suit "specifically and with particularity," despite the MBTA's clear statement that, although a timely presentment letter was received and a suit had been filed within the time

prescribed by Chapter 258, Mr. Theisz did not adequately present the allegations in his complaint, and with the MBTA's affirmative defense stating that his presentment did not satisfy Chapter 258?

2. Did the Superior Court err in finding that the MBTA waived its presentment defense due to a perceived Rule 9(c) defect, without providing leave to amend the answer?

#### STATEMENT OF THE CASE

This appeal concerns the MBTA's substantive right to be immune from suit due to Plaintiff's failure to make presentment of his negligence claim pursuant to the Massachusetts Tort Claims Act, M.G.L. c. 258, § 4, and the Superior Court's failure to give effect to that right due to a perceived procedural pleading deficiency under Mass. R. Civ. P. 9(c).

This action began on September 28, 2016, when Mr. Theisz filed a complaint in Suffolk Superior Court. R.A. 5. Mr. Theisz alleged that the MBTA was liable for an assault by a bus driver, as well as the negligent hiring, training, and supervision of that driver. R.A. 9-12.

With respect to presentment, Mr. Theisz alleged:

- The Plaintiff notified the 15. Defendant of this claim on August 3, 2015 by means of a presentment letter sent to the executive officer of the MBTA sent via certified mail within two years of the date of the incident described in Plaintiff's Complaint.
- 16. Over six (6) months has elapsed since Plaintiff's notice was sent and no response has been received thus the Executive officer has failed to deny such claim within six months after the date upon which it was presented.
- R.A. 6. The MBTA responded to these allegations by stating:
  - 15. The defendant denies the allegations contained in this paragraph.
  - The defendant admits that 6 16. elapsed months has since the alleged notice was sent. defendant denies the allegations remainder of this in the paragraph.
- R.A. 14. In addition to these responses, the MBTA also raised the affirmative defense that "Plaintiff failed to make proper presentment of this claim pursuant to M.G.L. Chapter 258, § 4." R.A. 22. Despite this response and having several weeks under the statute to do so, Mr. Theisz did not submit a revised presentment letter to the MBTA.

On May 11, 2017, the MBTA filed a motion for judgment on the pleadings, arguing that: Theisz's negligence claim should be dismissed for lack of proper presentment; and (2) Mr. Theisz's assault claim should be dismissed because it is barred by the Tort Claims Act's immunity for intentional torts. R.A. 27-32. Mr. Theisz opposed the motion. Tellingly, Plaintiff did not argue that the MBTA had failed to meet the Rule 9(c) pleading requirement in its answer. Instead, he contended that the MBTA was estopped from raising defective presentment because the "actions in continuing to move Plaintiff's claim forward made Plaintiff believe presentment wasn't an issue," i.e., a "lulling" argument. R.A. 38. He also asserted that the MBTA had notice of his claim, thus satisfying the purpose of the presentment requirement. R.A. 34-37. The MBTA filed a reply in which it explained that the MBTA had not "lulled" Mr. Theisz into believing that presentment would not be an issue, it lacked actual notice of Plaintiff's and that negligence claim. R.A. 52-56.

The Superior Court set a hearing on the MBTA's motion for August 1, 2017. Just days before the hearing, Mr. Theisz filed a "Motion to Submit Limited

Additional Material," without complying with Superior Court Rule 9A. R.A. 58. The motion contained several arguments, including that the MBTA's response to Mr. Theisz's presentment allegations lacked specificity. R.A. 65. Because Mr. Theisz asked for waiver of Rule 9A's service requirements, the MBTA did not have the opportunity to oppose the motion in writing in the ordinary course. The MBTA nonetheless objected to the improper motion at oral argument on its motion for judgment on the pleadings. R.A. 112 (Tr. 5:11-14).

After oral argument, the Superior (Leighton, J.) granted in part and denied in part the MBTA's motion for judgment on the pleadings. The court held that Mr. Theisz had not properly presented his negligence claim to the MBTA because, under Tambolleo v. Town of West Boylston, 34 Mass. App. Ct. (1993), the MBTA had no opportunity to investigate and potentially resolve this claim prior to incurring the costs of suit. 1 R.A. 138. But the court refused to give effect to this holding, accepting instead Plaintiff's argument that the MBTA could not raise a defectivepresentment defense because it purportedly failed "to

<sup>&</sup>lt;sup>1</sup> It also determined that Mr. Theisz's assault claim was barred by the Tort Claims Act's immunity for intentional torts. That issue is not on appeal.

deny presentment 'specifically and with particularity' in its answer," pursuant to Mass. R. Civ. P. 9(c). R.A. 140. The Superior Court then compounded its error by finding the MBTA waived its immunity without applying Rule 15's directive to freely amendment, particularly where doing so is easily remedied and protects a substantive right to be immune from suit.

The MBTA filed a timely notice of appeal, invoking the doctrine of present execution. R.A. 143.2

<sup>&</sup>lt;sup>2</sup> Mr. Theisz took the unusual step of filing an "emergency" motion to strike the notice of appeal, arguing that the Superior Court's order denying the MBTA's motion for judgment on the pleadings on the basis of defective presentment did not fall under the doctrine of present execution. R.A. 146. The MBTA arqued that the motion to strike was improper because a long line of authority permits an interlocutory where a presentment defense appeal is (including a recent SJC decision on presentment that involved the interplay between presentment and Rule 9(c)), and because the court had no authority to overrule these decisions and determine appellate jurisdiction. R.A. 164. The Superior Court (Tochka, J.), after hearing argument on the motion, denied Mr. Theisz's motion to strike the MBTA's notice of appeal. R.A. 170.

#### STATEMENT OF THE FACTS

On the evening of March 3, 2015, Appellee Matthew Theisz approached an MBTA bus driven by Derek Smith and asked for directions. R.A.  $6 \ \P \ 9.^3$  According to Mr. Theisz, Mr. Smith then stepped off the bus and assaulted him. Id.  $\P \ 10$ .

On August 3, 2015, Mr. Theisz's counsel sent a letter addressed to Frank DePaola, the Interim General Manager of the MBTA. R.A. 70. The letter purported to provide "formal notice pursuant to G.L. c. 258 §4."

Id. The letter recounted the "assault" of March 3, 2015, and claimed that "Mr. Theisz will be permanently disabled as a result of the assault." Id. The letter did not mention any negligence-related claim, for failure to adequately hire, train, or otherwise. Id.

After this Court docketed the instant appeal, Mr. Theisz made a second jurisdictional challenge to this appeal by filing a motion to dismiss. Paper No. 3. On January 29, 2018, this Court ordered the MBTA to show cause as to why the Court had jurisdiction despite the lack of a final judgment. The MBTA filed an opposition to Mr. Theisz's motion to dismiss and a response to this Court's show-cause order, explaining in both that this Court had jurisdiction under the doctrine of present execution. Paper Nos. 5, 6. On February 6, 2018, this Court denied Mr. Theisz's motion to dismiss without prejudice.

<sup>&</sup>lt;sup>3</sup> The facts are taken as alleged in Mr. Theisz's Complaint.

#### SUMMARY OF ARGUMENT

The Superior Court correctly concluded that Mr. Theisz's presentment letter was defective for failing to apprise the MBTA of a negligence claim; however, it erred by determining that the requirements of Rule 9(c) had not been met. Because of this perceived pleading deficiency, the Superior Court allowed Mr. Theisz's negligence claim to proceed and barred the MBTA from relying on its defective presentment defense.

The Superior Court first erred by failing to recognize that the MBTA complied fully with Rule 9(c). Rule 9(c) states that where a plaintiff has alleged that all conditions precedent have been performed or have occurred, the defendant must deny performance of conditions precedent "specifically and with particularity." The MBTA did so, both in specific admissions and denials in its answer, and in an affirmative defense directed at the lack of proper presentment. Infra at 22-40.

Even assuming that the MBTA did not comply with Rule 9(c), the Superior Court erred by imposing the harsh penalty of waiver. Waiver, particularly a waiver of sovereign immunity, may only be found with a

defendant's knowing consent or through the defendant's litigation conduct, neither of which is present here. Rather than defaulting to waiver, the Superior Court should have given the MBTA leave to amend its answer. Waiver was particularly inappropriate here, where Plaintiff did not raise his Rule 9(c) argument until an eleventh-hour pleading in the form of a "Motion to Submit Limited Additional Evidence." Infra at 40-50.

This Court should therefore vacate the Superior Court's August 17, 2017 order denying the MBTA's motion for judgment on the pleadings and remand this case with an instruction for the Superior Court to grant the MBTA's motion.

#### ARGUMENT

#### I. STANDARD OF REVIEW

The Massachusetts Tort Claims Act, M.G.L. c. 258, serves as a limited waiver of sovereign immunity for certain tort claims brought against public employers in the Commonwealth. Under the Tort Claims Act's presentment requirement, codified at M.G.L. c. 258, § 4, a tort plaintiff must "first present[] his claim in writing to the executive officer of [a] public employer within two years after the date upon which the cause of action arose." "Strict compliance" with

the presentment requirement is necessary so that "the executive officer with the authority to settle a claim" can have "an adequate opportunity to investigate the circumstances surrounding that claim in order to determine whether an offer of settlement should be made." Weaver v. Commonwealth, 387 Mass. 43, 47 (1982).

In this case, the Superior Court denied the MBTA's motion for judgment on the pleadings on the ground that the MBTA's presentment defense was not sufficiently pleaded under Rule 9(c). This Court's review of the Superior Court's decision on the motion is de novo. Martinez v. Waldstein, 89 Mass. App. Ct. 341, 345 (2016).

Although a court's failure to grant leave to amend is typically reviewed for an abuse of discretion, e.g., Johnston v. Box, 453 Mass. 569, 582 (2009), that is not the procedural decision on review. Rather, the procedural decision on review is the propriety of the Superior Court's finding of waiver, which is reviewed de novo. See McCarthy v. Slade Assocs., Inc., 463 Mass. 181, 190 (2012) (although discovery rulings are typically reviewed for an abuse of discretion, "[m]ixed questions of law and fact,

such as whether there has been a waiver, generally receive de novo review" (citation omitted)).

## II. THIS COURT HAS JURISDICTION OVER THE MBTA'S APPEAL UNDER THE DOCTRINE OF PRESENT EXECUTION.

This Court has jurisdiction over this appeal under the doctrine of present execution because the appeal concerns the MBTA's ability to invoke its defective presentment defense. There is a long, unbroken line of cases under which appellate courts in Massachusetts have heard interlocutory appeals involving presentment issues under the doctrine of present execution. Rodriguez v. City of Somerville, 472 Mass. 1008, 1010 (2015); Shapiro v. City of Worcester, 464 Mass. 261, 264 (2013); Daveiga v. Boston Pub. Health Comm'n, 449 Mass. 434, 435 n.2 (2007); Coren-Hall v. MBTA, 91 Mass. App. Ct. 77, 78 n.5 (2017); Bellanti v. Boston Pub. Health Comm'n, 70 Mass. App. Ct. 401, 405-06 (2007).

This Court's appellate jurisdiction is not limited to the question of whether the presentment was

The MBTA thoroughly briefed the basis for this Court's jurisdiction in its opposition to Appellee's Motion to Dismiss (Paper No. 5) and its response to this Court's January 29, 2018 Order to Show Cause (Paper No. 6). The MBTA adopts and incorporates those arguments here. A summary of jurisdictional arguments has been included in this brief for the Court's convenience.

defective; it also considers issues collateral to presentment to ensure that the presentment requirement fulfills its purpose of protecting the Commonwealth from the costs of defending lawsuits from which it is otherwise immune. <u>E.g.</u>, <u>Shapiro</u>, 464 Mass. at 264 (considering the question of whether the Tort Claims Act's presentment requirement could be applied retroactively to nuisance claims under the doctrine of present execution).

The SJC's decision in Rodriguez v. City of Somerville, 472 Mass. 1008 (2015), squarely answers the question of whether the doctrine of present execution applies to this appeal. In Rodriguez, the SJC invoked the doctrine to consider several presentment issues, including whether a defense of defective presentment was adequately pled under Massachusetts Rule of Civil Procedure 9(c). Id. at 1010 & n.3. That is the exact issue in this case.

# III. THE SUPERIOR COURT ERRED IN HOLDING THAT THE MBTA'S ANSWER DID NOT RAISE THE PRESENTMENT DEFENSE WITH SUFFICIENT PARTICULARITY.

Rule 9(c) states that "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." If a

plaintiff makes such an averment, "[a] denial of performance or occurrence shall be made specifically and with particularity." Id.

The rule was intended to relax what was once a taxing and uncertain pleading standard for plaintiffs. Prior to the current iteration of Rule 9(c), a plaintiff was required to plead the particulars of how it satisfied a condition precedent. See Mass. R. Civ. P. 9, reporter's note ("The failure of the plaintiff to allege the performance of conditions precedent to the right of the plaintiff to maintain his action was held sufficient grounds to sustain the defendant's demurrer."). Under the current rule, a plaintiff need only plead generally that conditions precedent had been met. The federal analogue (which Massachusetts

<sup>&</sup>lt;sup>5</sup> The prior rule stated: "Twelfth, the condition of a bond or other conditional obligation, contract or grant declared on shall be set forth. The breaches relied on shall be assigned, and the performance of conditions precedent to the right of the plaintiff to maintain his action shall be averred or his reason for the non-performance thereof stated." Mass. R. Civ. P. 9, reporter's note (citing M.G.L. c. 231, § 7).

follows) 6 was adopted because specific allegations regarding conditions precedent provided "minimal information value" and were outweighed by "the burden imposed by" the former rule, leading to "nonmeritorious dismissals for a failure to plead the fulfillment of conditions precedent that are not at issue suit simply in the or are overlooked accidentally by the pleader." 5A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure: Civil § 1302 (3d ed. 2017).

On the other side of the ledger, Rule 9(c) was not enacted to transfer the problems inherent in prior pleadings practice (i.e., an uncertain and moving target for pleading the performance of conditions precedent) from the complaint to the answer. Instead, the rule was enacted to ensure that the defendant

<sup>6</sup> Mass. R. Civ. P. 9, reporter's note ("Rule 9 is substantially the same as Federal Rule 9 and does not substantially alter Massachusetts practice."); generally Travers v. Travelers Ins. Co., 385 Mass. 811, 812 n.1 (1982) (looking to the interpretation of the federal Rule 9(c) "in the absence of significant difference in language or other compelling reason"); Rollins Envt'l Servs., Inc. v. Superior Court, 368 Mass. 174, 179-80 (1975) ("This court having adopted comprehensive rules of civil procedure in substantially the same form as the earlier Federal Rules of Civil Procedure, the adjudged construction theretofore given to the Federal Rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content").

advises the plaintiff of the condition precedent it intends to contest. The rule exists to ensure the particular condition precedent is put at "issue." 1 James WM. Moore & Joseph Friedman, Moore's Federal Practice § 9.03 (1938) (noting a "general denial will not put the performance or occurrence of any condition in issue"). Thus, a defendant cannot simply issue a general denial to a general allegation that conditions precedent have been met, or simply assert affirmative defense that the complaint fails to state a claim, as neither answer notifies the plaintiff which condition precedent is at issue. See, e.g., Smith v. Wal-Mart Stores, No. 06-cv-2069, 2006 WL 2711468, at \*7 (N.D. Cal. Sept. 20, 2006) (alleging a breach-of-contract claim is "barred to the extent [plaintiffs] failed fulfill to any contractual conditions precedent" is not sufficiently specific or particularized to satisfy Rule 9(c)); Brooks v. Monroe Sys. for Bus., Inc., 873 F.2d 202, 205 (8th Cir. 1989) ("mere assertion of 'failure to state a claim' is "not specific enough to join the issue").

Massachusetts law is in accord: a "general denial" (such as asserting that the "complaint fails to state a claim") is insufficient, but something

more, i.e., something that puts the particular condition precedent at issue, meets the pleading standard. See e.g., Travers v. Travelers Ins. Co., 385 (1982) (a "general denial" Mass. 811, 811 is insufficient to satisfy Rule 9(c), but identification of a reason or reasons for the asserted inadequacy" of the condition precedent satisfies the rule).

Here, the MBTA more than met that standard. Looking to its answer alone, it identified that the MBTA had received the presentment letter, that the suit was filed a sufficient time after its receipt, but that the letter itself did not adequately make presentment. That is all that was required. But the did more-it asserted an affirmative defense Theisz to the relevant statutory directing Mr. provision. Finally, the MBTA filed a motion for judgment on the pleadings, again based on Plaintiff's defective presentment. The Superior Court misapplied Massachusetts law on Rule 9(c) pleading sufficiency, failed to take into account the full record, and improperly applied a heightened pleading standard based not on Rule 9(c)'s directive that the defendant must identify the condition precedent at issue, but

based instead on Plaintiff's decision to plead more than what Rule 9(c) requires. Each of those errors merits reversal.

## A. The MBTA provided the notice required by Rule 9(c).

Under Rule 9(c), where a plaintiff avers that conditions precedent have been met, the defendant need only answer the following question: which of the conditions precedent has not been performed? The MBTA answered that question fully.

Here, Mr. Theisz opted in his complaint particular condition precedent identify the allegedly satisfied—the Tort Claims Act's presentment requirement. R.A. 6  $\P$  15, 16. And in response, the MBTA did not merely respond to Mr. Theisz's presentment allegations with an unadorned statement of "Denied." Instead, the response Mr. Theisz's to allegation was carefully calibrated SO that conveyed that: (1) the MBTA received a notice; and (2) over six months had passed since its receipt; but (3) the presentment was otherwise defective. R.A. 14  $\P$  15-16 ("The defendant admits that 6 months has alleged notice elapsed since the The was sent. defendant denies the allegations in the remainder of

this paragraph."). Moreover, the answer also provided the following affirmative defense: "Plaintiff's claim should be dismissed as Plaintiff failed to make proper presentment of this claim pursuant to M.G.L. Chapter 258, § 4." R.A. 22. The MBTA's response provided Mr. Theisz with sufficient information to determine that his presentment letter was defective, putting that condition precedent at issue in the litigation. That was more than enough to satisfy Rule 9(c). See Knott v. DeKalb Cty. Sch. Sys., No. 1:11-cv-2683-SCJ, 2014 10919525, at WL\*17 (N.D. Ga. July 16, 2014) (selective omissions and admissions, "[t]aken together, . . . provide 'a specific and particular' denial" as to satisfaction of a condition precedent).

The MBTA also filed its answer with sufficient time to cure his presentment defect. It did so nearly a month before the two-year presentment period for the purported claim would lapse. Compare R.A. 5-6 ¶¶ 6-13 (alleging events that occurred on March 3, 2015), with R.A. 23 (filing date of February 7, 2017). But Mr. Theisz did not use that time to correct the his deficiencies in letter. And when the reiterated its presentment defense in its motion for judgment on the pleadings, Mr. Theisz still did not

posit that he was unaware of the presentment deficiency. R.A. 36-38 (arguing, instead, "lulling" and "notice").

The Superior Court nevertheless determined, without much analysis, that "[t]he MBTA's answer stated only a general denial of the allegations," coupled with "a general affirmative defense." R.A. 139. After categorizing the MBTA's responses in such a manner, the Superior Court went on to hold that "[t]his sort of general denial is insufficient under the requirements of Mass. R. Civ. P. 9(c)," and that only the MBTA's motion for judgment on the pleadings provided the requisite specificity. R.A. 140.

The Superior Court's reasoning is erroneous. It is at odds with the purpose of Rule 9(c), which is to provide notice of which condition precedent is lacking. It also overlooks controlling authority establishing that "general denials" of conditions precedent are far different from the MBTA's answer, which clearly notified Plaintiff of the condition precedent that was lacking (proper presentment), and that the presentment deficiency was not a timeliness or receipt failure, but instead a substantive failure in the letter provided.

A "general denial" is one that, in response to a general averment that conditions precedent have been met, does not identify the particular condition precedent at issue. See e.g., Travers, 385 Mass. at 811 (holding that Rule 9(c) is not satisfied when a defendant responds to an allegation that conditions precedent have occurred with only "[a] general denial allegation, unaccompanied that by identification of a reason or reasons for the asserted inadequacy"). Vasys v. Metropolitan District Commission, 387 Mass. 51, 56 (1982), also makes clear that a "general denial" is one that responds to a general averment of conditions precedent with straight denial. Id. at 56 (noting that the plaintiff had not averred in his complaint that conditions precedent had been met, but stating that, if he had, failing to respond to such a general averment without providing notice "of defective presentment answer" would have barred the Commonwealth's defense). Vasys identify situations where Travers and plaintiff would be left asking, which condition precedent has not been met. Those situations are inapposite to the facts here, where the MBTA's answer clarifies adequacy of that the Mr. Theisz's

presentment letter was at issue.

In finding that the MBTA had waived defective-presentment defense, the Superior Court relied on (and misapplied) dicta from this Court's discussion of "boilerplate defenses" in Martin v. Commonwealth, 53 Mass. App. Ct. 526 (2002) R.A. 140. Martin did not weigh the adequacy of a particular defense under Rule 9(c), and, in fact, reached the substantive presentment issue. But in doing so, it warned against "thoughtless, inattentive assertion of multiple boilerplate defenses," and the defendant's failure to ensure that "there is a good ground to support each pleading." Martin, 53 Mass. App. at 533 (emphasis added). Only in the context of that general admonition did the Martin court note "in passing" that the plaintiff's averments of proper presentment meant "more was required of the Commonwealth than assertion of a general denial and a boilerplate affirmative defense." Id. at 532 n.4. In the case on appeal, the MBTA did not assert a general denial, nor it rely on a boilerplate defense that plaintiff's complaint fails to state a claim. Superior Court therefore erred when it relied Martin in holding that the MBTA did not satisfy Rule

9(c).

The Superior Court's decision also contravenes the SJC's decision in Rodriguez v. City of Somerville, 472 Mass. 1008 (2015). There, a plaintiff brought a negligence claim against the City of Somerville for injuries allegedly suffered by the plaintiff's minor son at school. Id. at 1008. As part of that claim, the plaintiff alleged: "Timely and proper presentment was made to City of Somerville pursuant to Massachusetts General Laws Chapter 258, section 4." ADD-12.7 The city responded in two ways. First, the city filed a one-page motion to dismiss, which stated:

As set forth herein, plaintiff has failed to meet the requirements of presentment of its claim to the City prior to filing this civil action, the time has expired for making such presentment, and therefore the complaint must be dismissed for failure to state a claim upon which relief can be granted.

ADD-13. The city attached to the motion correspondence that purportedly showed lack of proper presentment. After the trial court denied the city's motion, the city filed an answer. In response to the plaintiff's

<sup>&</sup>lt;sup>7</sup> For the Court's convenience, the relevant pleadings from the <u>Rodriguez</u> case have been included in the Addendum to this brief. This Court may take "judicial notice of the docket entries and papers filed in separate cases." <u>Home Depot v. Kardas</u>, 81 Mass. App. Ct. 27, 28 (2011).

presentment allegation, the city responded: "Denied." ADD-44 ¶ 12. It also asserted the following as part of its affirmative defenses: "The plaintiff, [sic] failed to give the defendant proper notice of his injuries and claims as required by law, and his action is therefore, barred." ADD-46.

After filing its answer, the city filed interlocutory appeal, seeking review of the trial court's denial of its motion to dismiss. On appeal, the plaintiff argued that the city "waived the defense of defective presentment by failing to comply with the requirements of Mass. R. Civ. P. 9(c)." Rodriguez, 472 Mass. at 1010 n.3. The SJC rejected the plaintiff's Rule 9(c) attack and held that the city adequately preserved its claim of defective presentment. It first noted that the single-page motion "clearly stat[ed] its claim of defective presentment"-indeed, it was "the single basis for the motion." Id. As for the answer, the SJC noted that the pleading did not raise defective presentment "as specifically or particularly as it could have." Id. But the Court nonetheless concluded that Rule 9(c) was satisfied because "the plaintiff was clearly on notice of the city's claim of defective presentment." Id.

This case presents a more compelling case of compliance with Rule 9(c) than Rodriguez, where the SJC found compliance with the rule. First, the MBTA went above and beyond what the SJC deemed to be adequate in Rodriquez (i.e., responding "Denied" to an averment of proper presentment). See 472 Mass. at 1010 The MBTA responded to each of Mr. Theisz's n.3. presentment pleadings with specificity: it conceded that (1) a notice had been received and (2) over six months had passed since the MBTA had received the notice. R.A. 14. The MBTA's presentment defense also was more specific than the one in Rodriguez; rather than generally indicating that there were notice issues, was the Rodriguez, the as case in MBTA highlighted the presentment statute as the specific basis for its defense. ADD-44 ¶ 12. If Rodriquez sets the minimum bar for satisfaction of Rule 9(c), the MBTA's answer more than meets it.

# B. The Superior Court's decision improperly disregarded pleadings that put Plaintiff on notice of defective presentment.

The ultimate inquiry under Rule 9(c) is whether a plaintiff has notice of a defendant's presentment defense. Rodriguez, 472 Mass. at 1010 n.3. Moreover, notice can be gleaned not only from the defendant's

responses to the plaintiff's allegations, but also from the totality of the circumstances in the litigation. <u>Id.</u> ("Given the circumstances of this case, and the fact that the plaintiff was clearly on notice of the city's claim of defective presentment, we reject the plaintiff's claim of waiver.").

Since the start of this litigation, the MBTA has made clear that Mr. Theisz did not submit a proper presentment letter. R.A. 14, 22. He therefore is hard-pressed to assert that he was not "clearly on notice" of the MBTA's defective presentment defense. Indeed, Mr. Theisz did not even assert that he <u>lacked notice</u> of this issue until after the briefing on the MBTA's motion for judgment on the pleadings (based <u>solely</u> on presentment) was complete.

Here, the MBTA's Rule 12(c) motion for judgment on the pleadings, as in Rodriguez, further made clear where the lines were drawn on non-performance of the condition precedent. It made only one argument as to the negligence claim: "[t]he plaintiff's purported letter of presentment fails to notify the MBTA of the claims contained in count IV." R.A. 29. Like the motion in Rodriguez, the MBTA's "single basis" for arguing that it was entitled to judgment on Mr.

Theisz's negligence claim was a claim of defective presentment.

Like Rodriquez, cases interpreting the federal analogue to Rule 9(c) confirm that courts must not take a narrow view on what can provide notice of improper presentment. Despite the rule's overt focus "denials," federal courts have looked at the totality of the procedural history, including affirmative defenses raised in the dispositive motions, to determine whether a condition precedent was denied with sufficient particularity and specificity. See, e.g., Heights Driving Sch., Inc. v. Top Driver, Inc., 51 F. App'x 932, 939-40 (6th Cir. 2002) ("Rule 9(c) does not specify that a denial of the performance of a condition precedent must be made in an answer. . . [W]e think that the specific denials made in [the] summary judgment motion are sufficient."); Life Plans, Inc. v. Sec. Life of Denver Ins. Co., 800 F.3d 343, 352 n.2 (7th Cir. 2015) (answer "as a whole" should be reviewed in determining whether condition-precedent defense was "waived . . .

by failing to plead it with particularity").8

The totality of the record reinforces that the MBTA made Mr. Theisz acutely aware of the presentment deficiency. The MBTA identified in an affirmative defense the relevant statutory scheme and the part of the scheme with which Mr. Theisz failed to comply. Compare Myers, 592 F.3d at 1224 ("Plaintiff did not exercise her right to sue or to file her Complaint within the time prescribed by the statute [Title VII]." (emphasis added)), with 22 R.A. ("Plaintiff's claim should be dismissed as Plaintiff failed to make proper presentment of this claim pursuant to M.G.L. Chapter 258, § 4."). And (unlike the defendants in Myers) the MBTA did more elsewhere; it admitted certain facts (that a timely letter was

<sup>&</sup>lt;sup>8</sup> Myers v. Central Florida Investments, Inc., 592 F.3d 1201 (11th Cir. 2010), provides another example of how a condition precedent may be placed at issue. Although defenses "affirmative are . . distinct from denials," the court determined that, although the averment in response to the plaintiff's condition precedent allegation was not, in itself, sufficient, affirmative defenses were. Id. at with the ("[T]echnical noncompliance pleading requirements" gives way "where the substance of the pleading is sufficient" and notifies the plaintiff of the failure to satisfy conditions precedent.); cf. Heights Driving, 51 F. App'x at 939 (recognizing that Rule 9(c) "does not specify that a denial of the performance of a condition precedent must be made in an answer or amended answer").

received), while denying the rest specifically by implication. Finally, the MBTA filed a motion for judgment on the pleadings based on the same defective presentment. After all this, Mr. Theisz tellingly did not assert in opposition to the MBTA's motion for judgment on the pleadings that the MBTA's answer failed to put him on notice of the presentment issue. Thus, the MBTA's actions were more than enough to put Plaintiff on notice of the presentment issue.

### C. Rule 9(c)'s answering obligations do not change based on what a plaintiff pleads.

Rule 9(c) allows a plaintiff to aver generally that conditions precedent have been met but, if a plaintiff does more than that, it does not change the standard applicable to defendants. Here, Mr. Theisz than а general opted to do more averment; identified the condition precedent that he allegedly performed. But the specific averment by Mr. Theisz that presentment had been made did not heighten the responsive pleading obligations. MBTA's With the particular condition precedent identified, the MBTA needed then only to plead that presentment had not been properly made. But, as discussed above, the MBTA did more than that.

Superior Court erred by adopting Plaintiff's view that there is a sliding scale of specificity, i.e., that if a plaintiff chooses to make allegations about presentment (or any other his precedent) with а greater degree specificity, the defendant must reciprocate in kind by responding with a greater degree of specificity. See R.A. 65 (arguing Mr. Theisz "specifically plead [sic] his Complaint that he had complied with the Presentment Requirement," and that "the MBTA had an obligation to dispute the validity of the presentment requirement with specificity").

Nothing in Rule 9(c) states that the level of specificity and particularity expected of an answer changes based on what a plaintiff alleges. Indeed, such a rule would be impossible to administer and would detract from the kind of predictability and uniformity the pleading rules were designed to foster. It would force defendants to meet an ever-higher bar, always guessing whether their responses are specific enough. The pleading process was never intended to be a vehicle for full factual development and exhaustive legal argumentation. See, e.g., Burks v. City of Philadelphia, 904 F. Supp. 421, 424 (E.D. Pa. 1995)

(rejecting "fact-laden" complaint as "unnecessary, burdensome, and . . . improper[ly] argumentative" and explaining that hyper-particularized pleading would "shift the factual emphasis from [the] discovery stage back to the pleading stage," which would "distort[] both the purpose and the function of the Federal Rules of Civil Procedure").

## IV. THE SUPERIOR COURT FURTHER ERRED BY FINDING WAIVER AND FAILING TO GRANT THE MBTA LEAVE TO CORRECT THE PLEADING DEFICIENCY PERCEIVED BY THE COURT.

Even if this Court agrees that the MBTA's answer did not satisfy Rule 9(c), this Court should vacate the Superior Court's finding of waiver and remand this case. The Superior Court erred by resorting to waiver first, rather than giving the MBTA an opportunity to replead its answer and correct an easily fixable technical deficiency.

# A. Because the presentment bar is an integral part of the MBTA's sovereign immunity, the Superior Court erred in finding waiver without a sufficient legal basis.

The presentment requirement is integral to the Commonwealth's "right to avoid harassing litigation," <a href="i.e.">i.e.</a>, its sovereign immunity from suit. <a href="Shapiro">Shapiro</a>, 464 Mass. at 265. Indeed, this Court allows for immediate, interlocutory review of presentment cases because a

government agency must be able to thoroughly exhaust an immunity-related defense before it is forced to litigate any further. Id. at 264-65. The immunity resulting from defective presentment is one from suit; it "would be lost forever" if a government agency was deprived of a justifiable opportunity to vindicate that right. See id. (citing Breault v. Chairman of the Bd. of Fire Comm'rs of Springfield, 401 Mass. 26, 31 (1987)). The Superior Court therefore erred when it concluded that the appropriate and final remedy for the MBTA's purported Rule 9(c) deficiency was waiver of the presentment defense.

Courts may not find waiver of sovereign immunity lightly. The SJC has recognized that any waiver of sovereign immunity must be clear and knowing. See, e.g., Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp., 443 Mass. 1, 13 (2004) (waiver of sovereign immunity established by facts showing the waiver was "bargained for[] and knowingly agreed to"). For that reason, courts allow parties to invoke immunity defenses even if they have not been properly pled in an answer. See, e.g., Smith v. Walsh, No. 2004-2561-F, 2008 WL 7086982 (Mass. Super. Ct. May 9, 2008) (defendant may raise absolute

immunity at summary judgment stage, despite not raising it in her answer); S & M Brands, Inc. v. Cooper, 527 F.3d 500, 507 n.4 (6th Cir. 2008) ("The Attorney General did not list sovereign immunity among its affirmative defenses in its initial answer. . . . The Attorney General raised the immunity defense in a motion to dismiss. That was sufficient to defeat any argument that the immunity issue had been waived."); Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (rejecting proposition that "sovereign immunity is an affirmative defense that unless raised in an answer is waived"); Ball Corp. v. Xidex Corp., 967 F.2d 1440, 1443-44 (10th Cir. 1992) (rejecting argument that defendant "waived immunity defense by not raising it in its answer," as defendant provided the adequate notice intended by Rule 8(c) in subsequent filings); Rutherford v. City of Portland, 494 A.2d 673, 675 (Me. 1985) (under Maine Tort Claims Act, defendant city "did not waive its sovereign immunity defense by failing to plead the defense in its answer or at trial"). To the extent any technical deficiency appeared in the MBTA's answer, the MBTA should have been afforded an opportunity to correct that deficiency, or, at the very least,

allowed to preserve its presentment defense. Instead, the Superior Court opted to impose the harsh penalty of waiver, and without sufficient legal basis for doing so.

be sure, immunities, including sovereign immunity, can be waived in court. A party can expressly waive the immunity and deliberately opt to proceed with litigation. See, e.g., Taylor v. U.S. Dep't of Labor, 440 F.3d 1, 5 (1st Cir. 2005) ("A state can waive its Eleventh Amendment immunity to suit . . . by a clear declaration that it intends to submit itself to the jurisdiction of a federal court or administrative proceeding . . . ." (quoting New Hampshire v. Ramsey, 366 F.3d 1, 15 (1st Cir. 2004)). Or it can waive immunity through litigation conductfor example, by removing a case to federal court, only to later claim that the court has no jurisdiction because the state is entitled to Eleventh Amendment immunity. Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 620 (2002) (waiver by litigation conduct is the result of "the judicial need to avoid inconsistency, anomaly, and unfairness").

Here, the MBTA did not expressly waive its immunity and did nothing to waive its presentment

defense through its litigation conduct. Nor did the Superior Court make any such necessary finding. A perceived Rule 9(c) pleading deficiency does not constitute "litigation conduct" showing waiver of sovereign immunity.9

Here, the MBTA did nothing affirmatively to indicate presentment would not be at issue and in fact did just the opposite through its answer and motion for judgment on the pleadings. Thus the Superior Court had no basis to find that the MBTA waived its presentment defense (and therefore its sovereign immunity) by failing to meet Rule 9(c)'s technical requirements.

#### B. An immediate finding of waiver contravenes the principle that leave to amend is to be freely given.

Rule 15(a) states that leave to amend a pleading "shall be freely given when justice so requires." Rule

<sup>&</sup>lt;sup>9</sup> By contrast, "lulling," <u>i.e.</u>, <u>affirmatively</u> inducing another party to believe that proper presentment has been made, can constitute waiver through litigation conduct. In <u>Vasys</u>, 387 Mass. at 51, a government agency manifested waiver by stating in response to discovery that "it had received notice and that the notice was [n]ot defective." <u>Id.</u> at 53. It was not until summary judgment that the defendant argued the plaintiff failed to comply with the Tort Claims Act's presentment requirement. <u>Id.</u> Citing "the unusual circumstances of [the] case," the <u>Vasys</u> Court held that the defendant could not raise a defective presentment defense. Id. at 57.

8(f) further instructs that "[a]ll pleadings shall be so construed as to do substantial justice." Thus, when an answer does not provide the sufficiency and particularity that Rule 9(c) demands, the first remedy is to grant leave to amend, and not to, as the Superior Court held, find waiver. This remedy is even more necessary where there is no dispute that an amendment will correct the perceived deficiency, and it is further called for when the issue is identified so early in the case.

Massachusetts and federal courts agree granting leave to amend an answer is the appropriate step for a trial court to take when faced with an answer that does not provide sufficient specificity and particularity. So long as the defendant would have difficulty satisfying the requirement "no specificity," a court should exercise its discretion allow the defendant to amend its answer under Massachusetts Rule of Civil Procedure 15(a). Salafia v. CNA Ins. Cos., 2001 Mass. App. Div. 8, 2001 WL 43588, at \*2 (Jan. 11, 2001); Uncle Henry's Inc. v. Plaut Consulting Inc., 240 F. Supp. 2d 63, 93 n.4 (D. Me. 2003), modified on reconsideration, No. Civ. 01-180-B-H, 2002 WL 31833139 (D. Me. Dec. 17, 2002)

("Rule 9(c) does not trump Rule 15(a).").

An immediate finding of waiver also conflicts with the intent of Rule 9(c). The rule's purpose is "orderliness and efficiency." EEOC v. Serv. Inc., 679 F.3d 323, 333 (5th Cir. 2012). It never was intended to serve as a cudgel by which a plaintiff could deprive a defendant of a substantive conditionprecedent defense. See, e.g., EEOC v. Bo-Cherry, Inc., No. 3:13-cv-00210, 2013 WL 2317724, at \*2 (W.D.N.C. May 28, 2013) (declining to apply the "drastic remedy" of striking an answer, as a "motion for more definite statement" is the "better remedy" for a Rule 9(c) deficiency). The appropriate response to a deficient answer is to grant an opportunity to replead or otherwise fix the pleading. Indeed, courts permit such amendments well beyond the fact discovery stage of this case, and even at summary judgment. Odyssey Reinsurance Co. v. Cal-Regent Ins. Servs. Corp., 123 Supp. 3d 343, 353 (D. Conn. 2015) ("Where defendants failed to deny with particularity in their pleadings the performance of conditions precedent, and raised particular failures for the first time at summary judgment, courts in this Circuit have allowed their pleadings." (emphasis defendants to amend

added)).

C. The Superior Court's immediate finding of waiver, without an opportunity to amend, frustrated the purpose of the presentment requirement.

Massachusetts courts have long recognized that the presentment requirement must be strictly enforced.

Weaver, 387 Mass. at 47. The requirement strikes a balance between the need to "allow plaintiffs with valid causes of action to recover for harm suffered from public entities" and the need to "preserve the stability and effectiveness of government by providing a mechanism which will result in payment of only those claims against government entities which are valid."

McGrath v. Stanley, 397 Mass. 775, 778 (1986); accord Shapiro, 464 Mass. at 268.

When a claim is properly presented to "the highest officer of an executive department," the executive officer is tasked with making certain determinations. Weaver, 387 Mass. at 48. The executive officer must make case-specific determinations, such as whether the claims are "inflated or invalid," and whether to offer a settlement prior to litigation. Id. The executive officer also must consider on a broader level whether "to institute promptly any corrective

measures designed to reduce the number of valid claims in the future." Id. These decisions put an agency in a position where it is "best able to ensure that the interests of the Commonwealth would be protected." Id.

The MBTA did not have an opportunity to make any of these determinations with respect to Mr. Theisz's negligence claim. As explained below, had Mr. Theisz bothered to properly present the negligence claim, the MBTA would have properly considered the totality of his claims and may have settled this case prior to suit-the entire point of the presentment defense. See Part V. But Mr. Theisz's failure deprived the MBTA of the chance to make that determination, and Superior Court penalized the MBTA for Mr. Theisz's failure-it allowed a tort claim to proceed despite the lack of an opportunity "for investigation, settlement, and preventive measures," in direct contravention of legislative intent. Wightman v. Town of Methuen, Mass. App. Ct. 279, 282 (1988), abrogated on other grounds by Alake v. City of Boston, 40 Mass. App. Ct. 610, 615 n.7 (1996).

# D. Plaintiff waived his Rule 9(c) argument below, further compounding the undue prejudice to the MBTA by not permitting amendment of its answer.

Plaintiff waived his Rule 9(c) argument below by not including it in his opposition to the MBTA's motion for judgment on the pleadings. Thus, the have entertained Superior Court should not (and accepted) his late arqument that the MBTA's substantive right to be immune from suit was waived by a claimed pleading defect. USTrust Co. v. Kennedy, 17 Mass. App. Ct. 131, 137 (1983) (late affidavit should not be accepted on the day of argument if the other party "could not effectively respond"). Plaintiff's waiver of his Rule 9(c) argument by not raising it until an eleventh-hour "Motion to Submit. Limited Additional Material" filed outside Superior Court Rule 9A further supports reversal. The fact that the Rule 9(c) argument only arose in this highly irregular procedural vehicle, when the MBTA had no opportunity to respond in full, or even in writing, compounds the undue prejudice to the MBTA in not allowing amendment remedy any perceived and easily correctable to pleading deficiency.

Rule 15 ultimately is a rule about fairness, with

a strong thumb in favor of amendment so that substantial justice is ensured. See Foman v. Davis, 371 U.S. 178, 182 (1962) ("Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded . . . [so that a party is] afforded an opportunity to test [a] claim on the merits . . . ."); Mass. R. Civ. P. 15, reporter's note (discussing Foman). It advises against strict interpretation of procedural rules to the detriment of substantive rights. E.g., Manfrates v. Lawrence Plaza Ltd. P'ship, 41 Mass. App. Ct. 409, 414 (1996) (leave to amend should be granted even several years after filing of pleading to accommodate proper allegation of a theory of the case of which all parties were already aware, but had not been properly pled). Here, where Plaintiff's argument on Rule 9(c) was in itself defective for not being raised at the appropriate time, that is further reason to reverse and allow amendment of the answer.

## V. THE SUPERIOR COURT CORRECTLY DETERMINED THAT MR. THEISZ'S PRESENTMENT LETTER FAILED TO ADEQUATELY INFORM THE MBTA ABOUT HIS NEGLIGENCE CLAIM.

If this Court concludes that the MBTA preserved its presentment defense under Rule 9(c), it should uphold the Superior Court's finding of defective

presentment and remand this case with instruction to grant the MBTA's motion for judgment on the pleadings.

The Superior Court correctly determined that Mr. Theisz's presentment letter was clearly defective. This Court's decision in Tambolleo v. Town of West Boylston, 34 Mass. App. Ct. 526 (1993), is controlling and wholly dispositive. The plaintiff in that case sent a presentment letter to the defendant town's selectmen alleging a claim of assault and bodily injury caused by one of the town's police officers. Id. at 532. Later, when the plaintiff sued the town, he tacked on claims of negligent supervision and emotional distress, claims he neglected to raise in his presentment letter. Id. This Court held that, by failing to properly present his negligence claims, the plaintiff failed to ensure that "the responsible public official receives notice of the claim so that official can investigate to determine whether or not a claim is valid, preclude payment of inflated or nonmeritorious claims, settle valid claims expeditiously, and take steps to ensure that similar claims will not be brought in the future." Id. Although it was true that the defendant would have factual investigation had the undertaken the same

negligence claims been properly presented, this Court determined that the defective presentment could not be excused because the only properly presented claim was one that was clearly barred by the Tort Claims Act's immunity provisions. Id. at 533. Accordingly, the defective presentment would not have prompted the defendant's selectmen to fully investigate the claim, as they would have known the bar on intentional torts easily disposed of it. Id.

Because the operative facts are identical Tambolleo, the Superior Court correctly in determined that Mr. Theisz's presentment letter to the MBTA was defective. Mr. Theisz's presentment letter asserted a "claim for [the] severe and permanent personal injuries he sustained as a result of an assault by Derek Smith, driver of MBTA bus 896." R.A. 70 (emphasis added). The letter goes on to allege that Mr. Theisz "sustained traumatic brain damage" as the result of "this brutal assault," and that he will be "permanently disabled as a result of the assault." Id. (emphasis added). The presentment letter did not mention a negligence claim. Had Mr. Theisz presented a claim other than one that was clearly barred, the MBTA would have had six months to properly consider his

pre-suit demand. <u>See Tambolleo</u>, 34 Mass. App. Ct. at 533. But like the town in <u>Tambolleo</u>, the MBTA was denied that opportunity because the only claim alleged was one barred by the Tort Claims Act—a claim for the intentional tort of assault. Because Mr. Theisz did not make his negligence claim until this lawsuit, the Superior Court correctly held that his presentment was fatally defective.

#### CONCLUSION

This Court should vacate the Superior Court's August 17, 2017 order denying the MBTA's motion for judgment on the pleadings and remand this case with an instruction for the Superior Court to grant the MBTA's motion.

#### /s/ Roberto M. Braceras

ROBERTO M. BRACERAS
BBO NO. 566816

SARAH K. FREDERICK
BBO NO. 679885

GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

Tel: (617) 570 1000

Fax: (617) 523 1231
rbraceras@goodwinlaw.com
sfrederick@goodwinlaw.com

JOHN J. BONISTALLI BBO No. 049129 SCOTT A. SPENCER BBO No. 678116 JENNIFER LEE SAGE BBO No. 677949 Law Offices of John J. Bonistalli 160 Federal Street, 15th Floor Boston, MA 02110 Tel: (617) 737-1771 john.bonistalli@ bonistallilaw.com scott.spencer@ bonistallilaw.com jennifer.lee@ bonistallilaw.com

#### CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel states that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(b), 16(e), 16(f), 16(h), 18, and 20.

Dated: February 28, 2018 /s/ Roberto M. Braceras
Roberto M. Braceras

#### CERTIFICATE OF SERVICE

I, Roberto M. Braceras, counsel for Appellant Massachusetts Bay Transportation Authority, hereby certify that I caused to be filed the foregoing Opening Brief and the Record Appendix through the Electronic Service Provider (eFileMA), thereby causing them to be served electronically upon the following counsel for Appellee Matthew Tehisz, a registered user, this 28th day of February, 2018:

David H. Rich Todd & Weld One Federal Street Boston, MA 02110 drich@toddweld.com

I further certify that I served two copies of the Opening Brief and the Record Appendix by causing them to be delivered by First Class Mail and email to counsel for Appellee Matthew Theisz, who are non-registered users, this 28th day of February, 2018:

Donald R. Grady, Jr, Frank J. Federico, Jr, Kelsey Raycroft Sheff Law Offices, P.C. 10 Tremont Street, 7th Floor, Boston, MA 02108

David H. Rich Todd & Weld One Federal Street Boston, MA 02110

/s/ Roberto M. Braceras
Roberto M. Braceras

### **ADDENDUM**

#### TABLE OF CONTENTS

Document	Page
Massachusetts Rule of Civil Procedure 9: Pleading Special Matters	ADD-1
M.G.L. c. 258, § 4	ADD-2
Memorandum of Decision and Order on the MBTA's Motion for Judgment on the Pleadings dated August 17, 2017	ADD-4
Complaint filed March 29, 2013, Rodriguez v. City of Somerville, Middlesex Sup. Ct. No. 2013-1105	ADD-11
Defendant City of Somerville's Motion to Dismiss for Failure to State a Claim, Rodriguez v. City of Somerville, Middlesex Sup. Ct. No. 2013-1105	ADD-13
Memorandum of Decision and Order dated June 19, 2013, Rodriguez v. City of Somerville, Middlesex Sup. Ct. No. 2013-1105	ADD-39
Notice of Appeal dated July 16, 2013,  Rodriguez v. City of Somerville,  Middlesex Sup. Ct. No. 2013-1105	ADD-41
Answer of Defendant City of Somerville,  Rodriguez v. City of Somerville,  Middlesex Sup. Ct. No. 2013-1105	ADD-43

#### PERTINENT STATUTES AND RULES

## Massachusetts Rule of Civil Procedure 9: Pleading Special Matters

#### (a) Capacity

It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

### (b) Fraud, mistake, duress, undue influence, condition of the mind

In all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

#### (c) Conditions precedent

In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

#### (d) Official document or act

In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

#### (e) Judgment

In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

#### (f) Time and place

For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

#### (g) Special damage

When items of special damage are claimed, they shall be specifically stated.

#### M.G.L. c. 258, § 4

Section 4. A civil action shall not be instituted against a public employer on a claim for damages under this chapter unless the claimant shall have first presented his claim in writing to the executive officer of such public employer within two years after the date upon which the cause of action arose, and such claim shall have been finally denied by such executive officer in writing and sent by certified or registered mail, or as otherwise provided by this section; provided, however, that a civil action against a public employer which relates to the sexual abuse of a minor, as provided in section 4C of chapter 260, shall be governed by section 4C1/2 of said chapter 260 and shall not require presentment of such claim pursuant to this section. The failure of the executive officer to deny such claim in writing within six months after the date upon which it is presented, or the failure to reach final arbitration, settlement or compromise of such claim according to the provisions of section five, shall be deemed a final denial of such claim. No civil action shall be brought more than three years after the date upon which such cause of action accrued; provided, however, that an action which relates to the sexual abuse of a minor, as defined in said section 4C of said chapter 260, shall be governed by said section 4C1/2 of said chapter 260. Disposition of any claim by the executive officer of a public employer shall not be competent

evidence of liability or amount of damages.

Notwithstanding the provisions of the preceding paragraph, in the case of a city or town, presentment of a claim pursuant to this section shall be deemed sufficient if presented to any of the following: mayor, city manager, town manager, corporation counsel, city solicitor, town counsel, city clerk, town clerk, chairman of the board of selectmen, or executive secretary of the board of selectmen; provided, however, that in the case of the commonwealth, or any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof, presentment of a claim pursuant to this section shall be deemed sufficient if presented to the attorney general.

The provisions of this section shall not apply to such claims as may be asserted by third-party complaint, cross claim, or counter-claim, or to small claims brought against housing authorities pursuant to sections twenty-one to twenty-five, inclusive, of chapter two hundred and eighteen; provided however, that no small claim shall be brought against a housing authority more than three years after the date upon which the cause of action arose.



#### COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT CIVIL ACTION NO. 2016-3000

#### **MATTHEW THEISZ**

VS.

#### MASSACHUSETTS BAY TRANSPORTATION AUTHORITY & another<sup>1</sup>

## MEMORANDUM OF DECISION AND ORDER ON THE MBTA'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff Matthew Theisz (the "plaintiff") brought this suit against the defendants, Massachusetts Bay Transportation Authority (the "MBTA") and Derek Smith ("Smith"), following a physical altercation between the plaintiff and Smith, an MBTA bus driver. The MBTA now moves for judgment on the pleadings as to Count IV (negligent hiring, training and supervision) and Count V (vicarious liability/respondent superior). For the reasons that follow, the MBTA's motion for judgment on the pleadings is **ALLOWED IN PART** and **DENIED IN PART**.

notrusent

#### **BACKGROUND**

The following facts are taken from the record. On March 3, 2015, at approximately

10:45 p.m., defendant Smith was operating an MBTA bus in Lynn, MA. At the Central Square

bus stop, the plaintiff asked Smith for directions. Smith then exited the bus and physically

attacked the plaintiff.

Pursuant to G. L. c. 258, § 4, the plaintiff sent a presentment letter to the MBTA, dated August 3, 2015. In that letter, the plaintiff noted that the assault occurred and that the plaintiff

Derek Smith

suffered injuries as a result.<sup>2</sup> The plaintiff received no offer of settlement or other response to the letter.

The plaintiff filed this suit on September 28, 2016 alleging negligence (Count I), assault and battery (Count II), and intentional infliction of emotional distress (Count III) against Smith. The complaint further alleged negligent hiring and supervision (Count IV) and a claim for vicarious liability (Count V³) against the MBTA. In paragraph fifteen of the complaint, the plaintiff alleged compliance with the presentment requirement of G. L. c. 258, § 4, stating: "The Plaintiff notified the Defendant of this claim on August 3, 2015 by means of a presentment letter ...."

In its answer, filed February 10, 2017, the MBTA denied paragraph fifteen of the complaint, and raised defective presentment as an affirmative defense, stating, "Plaintiff's claim should be dismissed as Plaintiff failed to make proper presentment of this claim pursuant to M. G. L. Chapter 258, § 4."

#### **DISCUSSION**

Massachusetts Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." *Ritchie* v. *Department of State Police*, 60 Mass. App. Ct. 655, 659 (2004), quoting Mass. R. Civ. P. 12(c), 365 Mass. 754 (1974). "A motion for judgment on the pleadings pursuant to rule 12(c) is a challenge to the legal sufficiency of a complaint." *Welch* v. *Sudbury Youth Soccer Ass'n, Inc.*, 453 Mass. 352, 354 (2009). "A defendant's rule 12(c) motion is

<sup>&</sup>lt;sup>2</sup> The letter is contained in the record as Exhibit 1 to MBTA's motion for judgment on the pleadings. While it is not attached to the complaint, the court can consider the letter as a document relied upon in framing the complaint. See *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004).

<sup>&</sup>lt;sup>3</sup> The claim for vicarious liability is inadvertently labeled as Count III in the complaint.

'actually a motion to dismiss . . . [that] argues that the complaint fails to state a claim upon which relief can be granted.'" *Jarosz* v. *Palmer*, 436 Mass. 526, 529 (2002), quoting J.W. Smith & H.B. Zobel, Rules Practice § 12.16 (1974).

The plaintiff's claims against the MBTA are governed by the Massachusetts Tort Claims Act, G. L. c. 258, § 1 *et seq.* Section 4 provides that a plaintiff, prior to filing suit against a public employer, must present his claim to the proper executive officer of a public employer within two years following the date upon which the cause of action arose. G. L. c. 258, § 4. This presentment requirement "ensures that the responsible public official receives notice of the claim so that that official can investigate to determine whether or not a claim is valid, preclude payment of inflated or nonmeritorious claims, settle valid claims expeditiously, and take steps to ensure that similar claims will not be brought in the future." *Lodge* v. *District Attorney for Suffolk Dist.*, 21 Mass. App. Ct. 277, 283 (1985).

In addition, Section 10(c) of the Tort Claims Act bars suit against a public employer for the intentionally tortious conduct of its employees. G. L. c. 258, § 10(c); see *Nelson* v. *Salem State College*, 446 Mass. 525, 537 (2006) ("a public employer cannot be sued for its employee's intentionally tortious conduct.")

Here, the MBTA moves for judgment on the pleadings, arguing that it is entitled to judgment as to Count IV because the plaintiff failed to make proper presentment pursuant to G. L. c. 258, § 4. Further, the MBTA argues that it is entitled to judgment on Count V because the MBTA cannot be held liable for the intentional torts of its employees.

#### 1. Count IV: Negligent Hiring, Training, and Supervision

As to Count IV, the MBTA argues that it is entitled to judgment because the plaintiff failed to make proper presentment. Specifically, the MBTA argues that the plaintiff's

presentment letter only made reference to defendant-Smith's alleged assault of the plaintiff, an intentional tort for which the MBTA cannot be held liable, and therefore was insufficient to put the MBTA on notice of the plaintiff's negligent hiring, training, and supervision claim.

The MBTA argues, and the court agrees, that this case is analogous to *Tambolleo* v. *West Boylston*, 34 Mass. App. Ct. 526, 532 (1993). The plaintiffs in *Tambolleo* brought suit against the defendant-town, alleging that they were assaulted by a police officer. *Id.* at 527. The plaintiffs' presentment letters stated only that the police officer assaulted them and caused them to suffer bodily injury. *Id.* at 532. However, when the plaintiffs filed suit, their complaint alleged a claim against the town for negligent training and supervision of its police officers. *Id.* at 527. The Massachusetts Appeals Court held that summary judgment was properly granted in favor of the defendant-town because the negligent supervision claim was not "expressly or impliedly asserted in the presentment letters." *Id.* The purpose of the presentment requirement was not fulfilled where the letters "apprise only of a claim arising out of an intentional tort...." *Id.* at 532. Since the only claim raised by the presentment letter was a claim barred by G. L. c. 258, § 10(c), the letters "would not serve to prompt the [town] to investigate [the officer's] assault for any purpose contemplated under G. L. c. 258...." *Id.* at 533.

The same is true in the instant case. The only allegation included in the plaintiff's presentment letter was that of an intentional tort, for which the MBTA is immune from liability. The letter would not serve to prompt the MBTA to investigate or otherwise enter into settlement discussions. As in *Tambolleo*, the plaintiff's presentment letter in the instant case "cannot fairly be read as stating [a] claim[] for negligent supervision . . . ." See *id*. Accordingly, as applied to Count IV, plaintiff's presentment was defective.

The court's inquiry does not end with the above conclusion, however. Exceptions to proper presentment do exist, and the plaintiff argues, among other things, that the defendant is barred from arguing defective presentment because the defendant failed to comply with Mass. R. Civ. P. 9(c). The court agrees.

Proper presentment, as a condition precedent, is governed by Mass. R. Civ. P. 9(c). See Rodriguez v. City of Somerville, 472 Mass. 1008 at 1010 n.3. (2015). Massachusetts Rule of Civil Procedure 9(c) provides as follows: "Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Mass. R. Civ. P. 9(c) (emphasis added).

Where proper presentment is alleged in a complaint, to contest such presentment in the answer, a defendant must do more than simply state an "assertion of [] general denial and boilerplate affirmative defenses." *Martin v. Commonwealth*, 53 Mass. App. Ct. 526 at 532 n.4 (2002). Where a defendant fails to deny the plaintiff's allegation of proper presentment "specifically and with particularity," as required by Mass. R. Civ. P. 9(c), the argument is waived, and "defective presentment is not an issue in the case." *Vasys v. Metropolitan District Commission*, 387 Mass. 51, 52 (1982).

Paragraph fifteen of the plaintiff's complaint alleged compliance with the presentment requirement of G. L. c. 258, § 4 by general averment, consistent with Mass. R. Civ. P. 9(c). The defendant was therefore required by the rule to deny the performance of proper presentment "specifically and with particularity," *Id.*, but it failed to do so. The MBTA's answer stated only a general denial of the allegations contained in paragraph fifteen of the plaintiff's complaint and asserted a general affirmative defense that the plaintiff's claims should be dismissed as the result

of defective presentment. This sort of general denial is insufficient under the express requirements of Mass. R. Civ. P. 9(c). See, *Martin*, 53 Mass. App. Ct. at 532, n.4.

Decisions from Massachusetts appellate courts specifically caution against such general denials of proper presentment. The Massachusetts Appeals Court in *Martin*, 53 Mass. App. Ct. 526, noted:

"in asserting answers and affirmative defenses, parties would do well to reacquaint themselves with, and heed the requirements of, the Rules of Civil Procedure . . . The thoughtless, inattentive assertion of multiple boilerplate defenses, available at the push of a button in the computer age, is a phenomenon of increasing frequency that runs counter to this certification and to the spirit and letter of the rules."

Id. at 533. The Supreme Judicial Court likewise commented on the issue in Rodriguez, 472 Mass. 1008. There, as here, the plaintiff argued that the defendant waived the defense of defective presentment where the defendant "raised defective presentment as an affirmative defense, albeit not as specifically or as particularly as it could have." Id. at 1010 n.3. In Rodriguez, the SJC ultimately ruled that the defendant did not waive the defense, despite the deficiency of the denial in its answer because, prior to answering, the defendant had moved to dismiss the complaint on "the single basis" of defective presentment. Id. According to the SJC, that was enough to put the plaintiff on notice of the defendant's defective presentment argument. Id. Thus, the SJC rejected the plaintiff's waiver argument.

In contrast, here, the MBTA filed its answer which contained only general denials of proper presentment, and only for the first time in this motion does the MBTA set forth an argument specifically identifying how presentment was improper. By failing to deny proper presentment "specifically and with particularity" in its answer, the MBTA waived the defense of defective presentment. Thus, the MBTA's motion for judgment on the pleadings as to Count IV must be denied.

#### 2. Count V: Vicarious Liability/Respondent Superior

In Count V, the plaintiff brings a claim for vicarious liability against the MBTA. Despite drafting this count as a negligence based claim, it is evident from the factual allegations in the complaint that the act of which the plaintiff complains is, at its core, an intentional tort.<sup>4</sup> The court agrees with the MBTA that Count V must be dismissed because the MBTA is immune under section 10(c) for the intentional torts of its employees to the extent a plaintiff's claim is based, not on the MBTA's own conduct, but purely on its status as a public employer. G. L. c. 258, § 10(c); see *Nelson*, 446 Mass. at 537 ("Intentional torts are expressly exempted from the Act, and therefore a public employer cannot be sued for its employee's intentionally tortious conduct."). Accordingly, judgment must enter in favor of the MBTA on Count V.

#### **ORDER**

For the reasons set forth above, it is hereby **ORDERED** that the Massachusetts Bay

Transportation Authority's motion for judgment on the pleadings is **ALLOWED IN PART** and **DENIED IN PART**. Judgment shall enter in favor of the defendant MBTA as to Count V for vicarious liability/respondent superior. The MBTA's motion is denied as to Count IV.

Jøseph F. Leighton, Jr.

Associate Justice of the Superior Court

August 17, 2017

<sup>&</sup>lt;sup>4</sup> To the extent that Count V for "vicarious liability/respondent superior" states a claim against the MBTA for "breach of its duty to exercise reasonable care in the hiring, training and supervision of its employees," that claim is duplicative of the allegations contained in Count IV.



MIDDLESEX, SS.

SUPERIOR COURT

EDGAR RODRIGUEZ, as father and Next friend of, RODRIGO RODRIGUEZ,

) INTHEOFFICE OF THE CLERK OF COURTS

MAR 2 9 2013

13-1105

VS.

CITY OF SOMERVILLE, Defendant

Plaintiff

CLERK CLERK

6725A000003/29/13CIVIL 6725A000003/29/13SURCHARGE 6725A000003/29/13SECC 6725A000003/29/13SUMMONS 240,00 15.00 20.00

#### **COMPLAINT**

- Plaintiff, Edgar Rodriguez, as father and next friend of minor plaintiff, Rodrigo Rodriguez, resides in Middlesex County, Somerville, MA.
- 2. The Defendant, City of Somerville is an entity established under Massachusetts Law located at City Hall, 93 Highland Avenue, Somerville, Massachusetts, which at all times relevant hereto has owned the subject property and been responsible for the maintenance of the Argenziano School located at 290 Washington Street, Somerville, Massachusetts.

## Count I-Negligence (Edgar Rodriguez, as father and next friend of Rodrigo Rodriguez vs. City of Somerville)

- On or about April 14, 2011, Plaintiff was a second grader attending Argenziano School located at 290 Washington Street, Somerville, Massachusetts.
- 4. While exiting the Premises at the end of the school day, minor Plaintiff was exiting the front doors of the school when the metal door frame fell off and struck him on the head.
- 5. Due to the defective door frame, minor plaintiff sustained serious personal injuries.
- 6. The door of the subject property was broken and unsafe.
- 7. Defendant owed the minor Plaintiff a duty to maintain said property.

- Defendant negligently and carelessly maintained said Premises so that it allowed a
  defective door to exist.
- 9. Defendant failed to warn the minor Plaintiff of the defects at the property.
- 10. As a direct and proximate result of Defendant's carelessness and negligence, minor Plaintiff was caused to suffer and continues to suffer great pain of body and anguish of mind, was caused to incur and continues to incur medical expenses, and also suffered personal injury.
- 11. Timely notice of the Plaintiff's injuries and the cause was given to occupiers of the Premises in accordance with M.G.L. ch. 84, § 21.
- Timely and proper presentment was made to City of Somerville pursuant to
   Massachusetts General Laws Chapter 258, section 4.

WHEREFORE, Plaintiff demands judgment against the Defendant in the amount of his damages, together with interest, costs and attorneys' fees.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS.

Respectfully submitted, Plaintiff, Edgar Rodriguez, As father and next friend of

Rodrigo Rodriguez,

Robert H. Mazow

BBO# 567507

Mazow McCullough, PC 10 Derby Square, 4<sup>th</sup> Floor

Salem, MA 01970

Phone (978) 744-8000

Fax (978) 744-8012

rem@helpinginjured.com

Dated: 3 11 (3

#### COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

V.

SUPERIOR COURT DEPARTMENT C.A. No. MICV2013-01105-F

EDWARD RODRIGUEZ as father and next friend of RODRIGO RODRIGUEZ, Plaintiff,

After review, this motion is DENIED.

See accompanying Memorandum of Decision

CITY OF SOMERVILLE, Defendant.

DENNIS J. CURRAN
Associate Justice

DEFENDANT CITY OF SOMERVILLE'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED

Now comes Defendant, City of Somerville, and pursuant to Mass. Rules Civ. P. 12(b)(6) respectfully moves this Honorable Court to dismiss Plaintiff's complaint.

As grounds therefor, Defendant states Plaintiff's complaint contains one-count alleging a claim of negligence against the City arising out an incident upon school premises in Somerville on April 14, 2011. As set forth herein, plaintiff has failed to meet the requirements of presentment of its claim to the City prior to filing this civil action, the time has expired for making such presentment, and therefore the complaint must be dismissed for failure to state a claim upon which relief can be granted. See M.G.L. c. 258, § 4.

Therefore, for the foregoing reasons, the City of Somerville requests this Honorable Court dismiss this action.

CITY OF SOMERVILLE By its attorney,

Jason D. Grossfield
Assistant City Solicitor
City Hall, Law Department
93 Highland Avenue
Somerville, MA. 02143
(617) 625-6600, ext. 4400
BBO# 666122
jgrossfield@somervillema.gov

#### CERTIFICATE OF SERVICE

This certifies that on May 2, 2013, I served the foregoing by first class mail, postage prepaid, on counsel of record: Robert E. Mazow, Mazow/McCullough, 10 Derby Square, 4<sup>th</sup> Floor, Salem, MA 01970.

Jason D. Grossfield Assistant City Solicitor

## **EXHIBIT 1**



May 11, 2011

## <u>Via Certified Mail</u> 7010 0780 0002 4121 1567

The Honorable Joseph A. Curtatone Somerville City Hall 93 Highland Avenue Somerville, MA 02143

RE:

Our Client:

Rodrigo Rodriguez, A Minor

Date of Birth:

April 22, 2003

Date of Incident:

April 14, 2011

Location of Incident:

Argenziano School

Dear Mayor Curtatone:

Please be advised that this office represents Rodrigo Rodriguez, a minor child, in regard to injurieshe sustained in incident occurring at the Albert F. Argenziano School at 290 Washington Street in Somerville, MA.

On April 14, 2011, Mr. Rodriguez was injured while he was exiting the school when the metal frame on the door fell off and hit him on the head.

Accordingly, we are requesting a copy of the school's full report on the incident. In addition, pursuant to M.G.L. c.140 § 157, we are also requesting any previous reports relating to incidents occurring at this school.

Please bill this office directly for any copying or retrieval fees. Should you have any questions, please let me know.

Thank you for your attention to this matter.

Very truly yours,

9

m@helpinginjwed.com

REM/lcr

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece,</li> </ul>	A. Signature  X
or on the front if space permits.  1. Article Addressed to:  HUNUADIE JOSEPH Curtata  Somerville City Hall  92 Hickin I Common August 198	D. Is delivery address different from item 1?
Somemille, MA	3. Service Type  Certified Mail Registered Return Receipt for Merchandise Insured Mail C.O.D.  4. Restricted Delivery? (Extra Fee)
2. Article Number (Transfer from service label) 7010 078	30 0002 4121 1567
PS Form 3811, February 2004 Domestic Retu	urn Receipt 2000 GUEZ 198595-02-M-1540

## **EXHIBIT 2**



May 11, 2011

## <u>Via Certified Mail</u> 7010 0780 0002 4121 1574

Somerville Public Schools Superintendent Anthony Pierantozzi 42 Cross Street Somerville, MA 02145

RE:

Our Client:

Rodrigo Rodriguez, A Minor

Date of Birth:

April 22, 2003

Date of Incident:

April 14, 2011

Location of Incident:

Argenziano School

Dear Superintendent Pierantozzi:

Please be advised that this office represents Rodrigo Rodriguez, a minor child, in regard to injuries he sustained in incident occurring at your school.

On April 14, 2011, Mr, Rodriguez was injured on school grounds. Accordingly, we are requesting a copy of the school's full report on the incident. In addition, pursuant to M.G.L. c.140 § 157, we are also requesting any previous reports relating to incidents occurring at this school, and any and all records regarding this incident from the school nurse.

Please bill this office directly for any copying or retrieval fees. Should you have any questions, please let me know.

Thank you for your attention to this matter.

Very truly yours

REM/lcr

kobert E. Mazow rem@helpingirjured.com

## COMPLETE THIS SECTION ON DELIVERY SENDER: COMPLETE THIS SECTION A. Signature Complete items 1, 2, and 3. Also complete ☐ Agent item 4 if Restricted Delivery is desired. Print your name and address on the reverse ☐ Addressee so that we can return the card to you. C. Date of Delivery B. Received by (Printed Name) Attach this card to the back of the mailpiece, or on the front if space permits. D. Is delivery address different from item 1? 1. Article Addressed to: If YES, enter delivery address below: □ No ville Public Schools 3. Service Type ☐ Certified Mail ☐ Express Mail ☐ Return Receipt for Merchandise ☐ Registered ☐ Insured Mail ☐ C.O.D. 4. Restricted Delivery? (Extra Fee) ☐ Yes 2. Article Number

Domestic Return Receipt

(Transfer from service label)

PS Form 3811. February 2004

0002

4121 1574

## **EXHIBIT 3**



# CITY OF SOMERVILLE, MASSACHUSETTS LAW DEPARTMENT

June 7, 2011

Robert E. Mazow, Esq. Mazow McCullough 10 Derby Square, 4<sup>th</sup> Floor Salem, MA 01970

Re:

Your client: Rodrigo Rodriguez

Our file #11177

Location and date of incident: Argenziano School, 4/14/11

Dear Mr. Mazow:

Enclosed please find a copy of the documents responsive to your public records request regarding the above-referenced matter.

Thank you for your attention.

Sincerely

Francis X. Wright Jr.

City Solicitor

encs.



## Massachusetts Department of Public Health – School Health Unit Report of 911 / Emergency Service Calls

Please forward to nurse leader (completed for emergencies during school hours only)

		1	to the emergences adving sensor near only
Sc	loon	Name Augenziano	School District Somewailly
Da	te of	911 call 4/14/11	Time of occurrence 3:10 pin
Pe	rson	filling out report Am Sitte	Lucy, R.N. Phone number 617 425 6600 Email blingay & K1Z,
	1.	Who made the decision to call 9	11 or other Emergency Service?  • Principal • Teacher • Guidance Counselor • SRO & Other Director  • of STudent Service
Ť	2.		ervice / Ambulance to arrive after being called? -10 Minutes
	3.	-	isitor re K – Grade 5 🗆 Grade 6-8 🗆 Grade 9 and over
1920	4.	Seizure D Diabetes G Asthma: Cardiac Syncope Other Injury: Intentional U Recess P Mead injury R Other (explain) Mental Health / Behavioral Hea	pinephrine administered If yes, was Epinephrine report submitted?  iastat administered lucagon administered  Itauma, Concussion e or action  finintentional hysical Education I Other ule out fracture I Laceration
	5.		g at the time of the incident?   Yes  No  Yed in the patient assessment?  Yes  No  Yed in the decision to transport?  Yes  No
	6.	Dis Was the patient (s) transported t Decision not to transfer Comments:	
	7.	Outcome: A Patient sent ho	ome from ER same day
	8.	Is there a 911 Protocol in your d	istrict?
	9.	Overall event evaluation:	□ Satisfactory
	10.	Recommendation for changes	□ Protocol change □ Policy change □ Educational change □ None

## City of Somerville, MA School Committee Accident Report

Student name: Rodrigo Rodriguez Robies	Main entrance to school, 2:35PM 04/14/11
Address: 268 Powderhouse Blyd.Somerville, MA 0214	
Phone: 617-981-1043	School:Argenziano at Lincoln Park Grade: 2
	Teacher/Room: Ms Quinlan, Rm 226
Accident reported by Homeroom Teacher witnessed by_	_: Ms Quinlan
Accident reported to: School Nurse2:45PM Teach Principal 2:45 PM  Describe the accident and the initial response, including Student was leaving school when panel dropped f was brought into Health Room at 2:45PM by Ms Quinlar and oriented, pupils equal and reactive. Nurse applied ice Office to wait for parent. Uncle came by public transport hospital for assessment. 911 called. Initial assessment mathospital 3:30PM.	names of individuals involved: from above entrance doorway onto his head. Student n, Ms Holland. Pt had bump on right top of head, alert e. Parents notified. Student was brought into Main tation and concern was for getting student to the
Parent/guardian notified: Yes_X_ by whom_Ms Qui	inlan
Any injury: No_ Yes_X_ Evaluated by:N	urse/ EMTs
Student: Returned to class Went home with paren	nt/guardian
Transported to: clinic hospital_X_	
9-911 called: No_ Yes_X Time called_3:10	OPM_ Time arrived3:15PM
Insurance information: No School Insurance	131/1 07
Insurance information: No School Insurance  Name and signature of person filling out report Willi  Data report written: 04/15/11	am Bingay, R.N. Allians Hugey, RN.
Date report written: 04/15/11	
I have investigated this case, have familiarized myself with handled correctly. Comments:  Principal name and signature  Date:	ith the details and believe that the case has been  4/14/1/
Status/condition of child the following day: Student atter Appointment follow-up next week after discharge from C Cc Principal/School Nurse	

## Incident Report - April 14, 2011

At approximately 2:45 P.M., the students who return home from school on Bus #3, were exiting through the front doors of the school building. As they were passing through, I heard a loud noise and witnessed my second grade student, Rodrigo Rodriguez, get hit on the head with a large (approximately 6 foot) piece of metal covering that was above the double doors. The child was struck on the head and stumbled for a bit. He was dizzy and crying. I brought him to the nurse's room immediately. The school nurse, Mr. Bengay, examined Rodrigo and placed ice on his head. We contacted Rodrigo's family and continued monitoring him in the office until his uncle and the emergency response team arrived. Rodrigo was taken to the hospital by ambulance approximately 35 minutes after the incident occurred.

I followed up with Rodrigo's uncle later on that evening, and Rodrigo had been examined at the hospital and released. Rodrigo returned to school the following day.

Signature: Phrifu Quinlan Second Grade Teacher (of student injured)

Date: 4/15/11

From:

George Landers

Sent:

Monday, December 13, 2010 8:47 AM

To:

'Terry, Jaan'

Subject: RE:

Jaan,

Jim Chambers is on the way over.

The entire building shop crew is at the WHCS taking care of the dozens of 311 work orders we have been unable to get to the last few months. Each school will be handeled like this for the coming weeks, as we will get to all the problems you have, just not as soon as we would like. Hang in there.

----Original Message----

From: Terry, Jaan [mailto:JTerry@k12.somerville.ma.us]

Sent: Monday, December 13, 2010 8:37 AM

To: George Landers

Subject:

George,

The door is not working, please send help....

Thanks, Jaan

From:

George Landers

Sent:

Wednesday, September 22, 2010 4:20 PM

To:

Gerald Boyle

Subject: Re:cafeteria doors still cannot be opened using the swipe cards

Ty

From: Gerald Boyle To: George Landers

Sent: Wed Sep 22 16:19:00 2010

Subject: RE:

George,

We had already asked Honeywell to look at the reader portion of the door system and they said it was fine. Good thinking, though.

I am sorry I didn't say this earlier - welcome back. Hope your feeling better.

JB

From: George Landers

Sent: Wednesday, September 22, 2010 2:54 PM

To: Gerald Boyle Subject: RE:

Because it is a card reader, I sent it to Honeywell to check it out.

----Original Message----

From: Gerald Boyle

Sent: Wednesday, September 22, 2010 10:27 AM

To: 'Holland, Betsey'

Cc: George Landers; Jimmy Roderick

Subject: RE:

Betsy,

The DPW has been looking into this. Maybe Jimmy or George can give us an update.

My recollection is that the DPW electrician had looked at the doors and found no power issues, and that Jimmy Chambers was going to check them out.

JB

From: Holland, Betsey [mailto:BHolland@k12.somerville.ma.us]

Sent: Wednesday, September 22, 2010 10:21 AM

To: Gerald Boyle

Subject:

Gerry,

The cafeteria doors still cannot be opened using the swipe cards. Is this a permanent condition or is it still on the list of things being worked on?

Betsey

Betsey Holland Betsey Holland Assistant Principal Argenziano School at Lincoln Park 617-625-6600 x 6692

From:

Terry, Jaan [JTerry@k12.somerville.ma.us]

Sent:

Tuesday, May 17, 2011 3:23 PM

To:

George Landers

Subject: FW:

From: Holland, Betsey

Sent: Thursday, December 16, 2010 9:39 AM

To: Pierantozzi, Tony; Melillo, Rich Cc: O'Brien, Barbara; Terry, Jaan

Subject:

#### Good Morning,

Our front door is still not operating correctly, and we are unable to open it using the "doorbell system". The locksmith from the city was here earlier in the week and determined that the problem was electrical. The electrician was supposed to be here "whenever"! I'm bringing this to your attention, as we have unlocked the inside front door temporarily, to allow for access to playgroups, CPC meeting and Family Network meeting. It is not obvious to visitors that the door is unlocked, and they continue to ring the bell. Unlocked, the door is responsive to the answering mechanism on Jaan's desk and will open automatically. In summary, we're fooling people into thinking that our state of the art building is locked up tight, but in reality we are somewhat compromised.

I will relock the door as soon as the majority of visitors have checked in.

Thanks,

Betz

Betsey Holland
Betsey Holland
Assistant Principal
Argenziano School at Lincoln Park
617-625-6600 x 6692

From:

Terry, Jaan [JTerry@k12.somerville.ma.us]

Sent:

Tuesday, May 17, 2011 3:23 PM

To:

George Landers

Subject: FW:

From: Terry, Jaan

Sent: Tuesday, December 14, 2010 9:48 AM To: 'George Landers'

Subject:

Hi George,

The door is still not working, the locksmith came yesterday AM, he said the electrician was coming, haven't seen him...

Thanks, Jaan

From: Terry, Jaan [JTerry@k12.somerville.ma.us]

Sent: Tuesday, May 17, 2011 3:22 PM

To: George Landers

Subject: FW:

From: Terry, Jaan

Sent: Monday, December 13, 2010 8:46 AM

To: O'Brien, Barbara Subject: FW:

From: George Landers [mailto:GLanders@somervillema.gov]

Sent: Monday, December 13, 2010 8:47 AM

To: Terry, Jaan Subject: RE:

Jaan,

Jim Chambers is on the way over.

The entire building shop crew is at the WHCS taking care of the dozens of 311 work orders we have been unable to get to the last few months. Each school will be handeled like this for the coming weeks, as we will get to all the problems you have, just not as soon as we would like. Hang in there.

----Original Message----

From: Terry, Jaan [mailto:JTerry@k12.somerville.ma.us]

Sent: Monday, December 13, 2010 8:37 AM

To: George Landers

Subject:

George,

The door is not working, please send help....

Thanks,

Jaan

Terry, Jaan [JTerry@k12.somerville.ma.us] From:

Tuesday, May 17, 2011 3:22 PM Sent:

George Landers To:

Subject: FW:

From: Terry, Jaan

Sent: Friday, December 10, 2010 8:58 AM
To: 'George Landers'

Subject:

Hi George,

Friday, December 10, 2010 8:57am, door still not working.

Jaan

From: Terry, Jaan [JTerry@k12.somerville.ma.us]

Tuesday, May 17, 2011 3:22 PM

To: George Landers

Subject: FW:

From: Terry, Jaan

Sent: Thursday, December 09, 2010 8:23 AM To: 'George Landers'

Subject:

Good morning George,

Thursday, December 9, 8:21am, front door still not working....

Thanks, Jaan

From: Terry, Jaan [JTerry@k12.somerville.ma.us]

Sent: Tuesday, May 17, 2011 3:17 PM

To: George Landers

Subject: FW:

From: Terry, Jaan

**Sent:** Friday, February 18, 2011 7:55 AM **To:** O'Brien, Barbara; Holland, Betsey

Subject: FW:

From: Veronica Garcia [mailto:VGarcia@somervillema.gov]

Sent: Thursday, February 17, 2011 4:33 PM

To: Terry; Jaan; 311

Cc: O'Brien, Barbara; Holland, Betsey; Aliano, Charlie

Subject: RE:

Hi Jaan.

Work order was submitted, 199933.

Veronica

From: Terry, Jaan [mailto:JTerry@k12.somerville.ma.us]

Sent: Thursday, February 17, 2011 11:17 AM

To: 311 Updates

Cc: O'Brien, Barbara; Holland, Betsey; Charlie Aliano

Subject:

Hi

Door # 6 at the Argenziano School will not open from the inside or the outside (safety issue).

Thanks Jaan Terry

Г	I A	В	T c	D	E	T F	G	Тн	7
1	-	Service Type	Dept	Ticket	Citizen Name	Priority		Closed	Description
2		DPW-School Buildings	DPW-B&G		HOLLAND, BETSEY		290 WASHINGTON ST	Y	One of the acoustical panels has fallen off the
3		DPW-School Buildings	DPW-B&G		JAAN, TERRY	3	290 WASHINGTON ST	N	We need a bulletin board hung at the Argenzi
4		DPW-School Buildings	DPW-B&G		, DPW WORKER	3	290 WASHINGTON ST	Y	replace filters for steamer table-done-sm-3/2
5		DPW-School Buildings	DPW-B&G		JAAN, TERRY	3	290 WASHINGTON ST	Y	leak in the ceiling tiles-changed 5 ceiling tiles-
6		DPW-School Buildings	DPW-B&G		, DPW WORKER	3	290 WASHINGTON ST	Ý	pick up and deliver man lift for electricians-do
7		DPW-School Buildings	DPW-B&G		, DPW WORKER	3	290 WASHINGTON ST	Ý	door handle hard to turn-done-3/22/11-jim c
8		DPW-School Buildings	DPW-B&G		YANES, EDWIN		290 WASHINGTON ST	Ý	I'm a technician at the Argenziano school and
9		DPW-School Buildings	DPW-B&G		LORENTI, AL		290 WASHINGTON ST	N	boy gang toilet-handicapp auto toliet does no
10		DPW-School Buildings	DPW-B&G		PIERANTOZZI, TONY		290 WASHINGTON ST	N	Lights that illuminate the School sign on Wash
11	0.00	DPW-School Buildings	DPW-B&G		TERRY, JAAN		290 WASHINGTON ST	N	Swipe cards at the Argenziano School will not
12		DPW-School Bulldings	DPW-B&G		IRWIN, JEANNE		290 WASHINGTON ST	N	Please put in a priority service call for the Arge
13	1100	DPW-School Buildings	DPW-B&G		PIERANTOZZI, TONY		290 WASHINGTON ST	Y	Please install shades on the high windows in t
14		DPW-School Buildings	DPW-B&G		CUSTODIAN		290 WASHINGTON ST	Y	boy's gang toilet-handicap stall-toilet automat
15		DPW-School Buildings	DPW-B&G		COLEMAN, RON		290 WASHINGTON ST	Y	door doesn't from insid eor outside
16		DPW-School Buildings	DPW-B&G		DALE, TOM		290 WASHINGTON ST	Y	inside door will not close
17		DPW-School Buildings	DPW-B&G		JAAN, TERRY		290 WASHINGTON ST	Y	The clocks are off (not the correct time) at the
18		DPW-School Buildings	DPW-B&G		JAAN, TERRY		290 WASHINGTON ST	Y	The clocks are off (not the correct time) at the
19	2	DPW-School Buildings	DPW-B&G		JAAN, TERRY		290 WASHINGTON ST	Y	The clocks are off (not the correct time) at the
20	and the second second	DPW-School Buildings	DPW-B&G		JAAN, TERRY		290 WASHINGTON ST	Y	The clocks are off (not the correct time) at the
21		DPW-School Buildings	DPW-B&G		JAAN, TERRY		290 WASHINGTON ST	Y	The clocks are off (not the correct time) at the
22		DPW-School Buildings	DPW-B&G		JAAN, TERRY		290 WASHINGTON ST	Y	The clocks are off (not the correct time) at the
23		DPW-School Buildings	DPW-B&G		HOLLAND, BETSEY		290 WASHINGTON ST	Y	The front doors at AFAS continue to malfunct
24		DPW-School Buildings	DPW-8&G				290 WASHINGTON ST	Y	Hi 311, Ceiling tile in room 306 Argenziano Sc
25		DPW-School Buildings			COLEMAN, RON		290 WASHINGTON ST	Y	leaks-ceiling tiles are stained
26	2/7/2011	DPW-School Buildings	DPW-B&G	199026	HOLLAND, BETSEY	3 .	290 WASHINGTON ST	Y	The sink in the Art room AFAS #315 has a fauc
27		DPW-School Buildings	DPW-B&G		TERRY, JAAN		290 WASHINGTON ST	Y	We have a leaky faucet in the Art Room 315 a
28	1/26/2011	DPW-School Buildings	DPW-B&G	197776.	JAAN, TERRY	3 :	290 WASHINGTON ST	Y	1) Room #316 lock broken
29	1/26/2011	DPW-School Buildings	DPW-B&G	197777 .	JAAN, TERRY	3 2	290 WASHINGTON ST	Y	Room#306 map racks need to be hung
30	1/4/2011	DPW-School Buildings	DPW-B&G	195594	PIERANTOZZI, TONY	1 2	290 WASHINGTON ST	Y	Barbara O'Brien AFAS, Principal: 1st floor girl
31	1/4/2011	DPW-School Buildings	DPW-B&G	195596	PIERANTOZZI, TONY	1 2	290 WASHINGTON ST	Y	Barbara O'Brien AFAS, Principal: Front doors
32	12/20/2010	DPW-School Buildings	DPW-B&G	194551	COLEMAN, RON	3 3	290 WASHINGTON ST	N	swipe card don't work on outside doors since
33	12/20/2010 (	DPW-School Buildings	DPW-B&G	194552	COLEMAN, RON	3 2	290 WASHINGTON ST	N	girls bathroom-1st stall toilet is broken-writte
34	12/20/2010	DPW-School Buildings	DPW-B&G	194553	COILEMAN, RON	3 2	90 WASHINGTON ST	Y	broken-still-called in-inside front door-not wo
35	12/14/2010	DPW-School Buildings	DPW-B&G	194385	MOORE, BUTCHIEE	3 2	90 Washington ST	Y	kid cut foot on weather strip next to door-bot
36	12/14/2010 (	DPW-School Buildings	DPW-B&G	194386	MOORE, BUTCHIE	3 2	90 WASHINGTON ST	Y	door will not open from the outside or insdie-
37	12/9/2010	DPW-School Buildings	DPW-B&G	194199	NOEZZO, EDDY	3 2		Y	its the front door not opening and door numb
38	12/6/2010 (	DPW-School Buildings	DPW-B&G	193947	NOEZZO, EDDY	3 2		Υ	the front door is not working
39	11/18/2010 (	DPW-School Buildings	DPW-B&G	193006	DALE, TOM	3 2		Y	door #9 sometimes stays open-must be check
40	11/18/2010	DPW-School Buildings	DPW-B&G	193056	MANCINI, LAUREN	151/3		Y	We are always having a problem with the sma
41		DPW-School Buildings	DPW-B&G		HOLLAND, BETSEY			Y	We need map racks hung in room 306. The ra
42		OPW-School Buildings	DPW-B&G		NOEZZO, EDDY			Y	Oil is leaking from room 315
43		DPW-School Buildings	DPW-B&G		CUSTODIAN			N	do not unlock when you use swipe card-(beer
44		OPW-School Buildings	DPW-B&G		CUSTODIAN			Y	girls bathroom-tollet paper holder is broken
_	376	DPW-School Buildings	DPW-B&G		CUSTODIAN				girls bathroom-toilet is broken-has two crack:
46		DPW-School Buildings	DPW-B&G	Christian South	CUSTODIAN				2nd filanding hand rail needs to be fixed-con
-		DPW-School Buildings	DPW-B&G		OLLAND, BETSEY				Stairwell #4 - Handrail on 2nd floor landing o
_		DPW-School Buildings	DPW-B&G		OLIAND, BETSEY		34 11713.11.		1st floor Girls' Bathroom – toilet is cracked ar
		DPW-School Buildings	DPW-B&G		OLLAND, BETSEY		20 117501111		Cafeteria doors do not operate off swipe carc
		DPW-School Buildings	DPW-B&G		OLLAND, BETSEY		20 (17)		Water fountains in the gym need to be adjust
51		DPW-School Buildings	DPW-B&G		LIANO, CHARLIE		20 11701111		Charlie called to inform us that over at argeni
52		DPW-School Buildings	DPW-B&G		ALE, TOM		30 41/0/1111		light sparking-changed all bulbs-only one out
53		DPW-School Buildings			MOORE, BUTCH				girls bathroom-toilet has two cracks in it, on 1
54		PW-School Buildings	DPW-B&G		UDOLPH, DOROTHY		30 117-51		Leaks have been detected in the following are
55		PW-School Buildings			UDOLPH, DOROTHY	3 2		23	Leaks have been detected in the following are
56	3/31/2010 0	PW-School Buildings	DPW-B&G	1/6403 R	UDOLPH, DOROTHY	3 2	90 WASHINGTON ST	-	Leaks have been detected in the following are

S	Ţ	U	
Custom Prompt 1	Custom Response 1	Custom Prompt 2	Custom Response 2
To Which School does the request ap	ply? Argenziano	What is the number or general location of the issue?	acoustical panels, cafertia
To Which School does the request ap		What is the number or general location of the issue?	room 105
To Which School does the request ap	ply? Argenziano	What is the number or general location of the issue?	kitchen
To Which School does the request ap		What is the number or general location of the issue?	rm309
To Which School does the request ap	ply? Argenziano	What is the number or general location of the issue?	loading dock
To Which School does the request ap		What is the number or general location of the issue?	rm211
To Which School does the request ap		What is the number or general location of the issue?	309A
To Which School does the request ap		What is the number or general location of the issue?	2nd fl
O To Which School does the request ap		What is the number or general location of the issue?	outside school
1 To Which School does the request ap		What is the number or general location of the issue?	door #6
2 To Which School does the request ap	A COUNTY OF THE PERSON OF THE	What is the number or general location of the issue?	Kitchen
3 To Which School does the request ap	No. of the second secon	What is the number or general location of the issue?	art room
4 To Which School does the request ap	William Commence	What is the number or general location of the issue?	2nd fl
5 To Which School does the request ap		What is the number or general location of the issue?	side door#6
	Marie 1911 State of the Control of t	What is the number or general location of the issue?	main entrance
To Which School does the request ap		What is the number or general location of the issue?	room 112
7 To Which School does the request ap		What is the number or general location of the issue?	room 114
8 To Which School does the request ap		What is the number or general location of the issue?	room 121
9 To Which School does the request ap		What is the number or general location of the issue?	room 122
To Which School does the request ap	A STATE OF THE PARTY OF THE PAR	What is the number or general location of the issue?	room 123
1 To Which School does the request ap		What is the number or general location of the issue?	room 123
2 To Which School does the request ap		What is the number or general location of the issue?	front doors at AFAS
To Which School does the request ap		What is the number or general location of the issue?	
To Which School does the request ap		What is the number or general location of the issue?	rm309a
To Which School does the request ap			#315
To Which School does the request ap		What is the number or general location of the issue?	room 315
7 To Which School does the request ap		What is the number or general location of the issue?	room 316
To Which School does the request ap		What is the number or general location of the issue?	room 306
To Which School does the request ap		What is the number or general location of the issue?	bathroom
To Which School does the request ap		What is the number or general location of the issue?	doors
To Which School does the request ap		What is the number or general location of the issue?	cafe doors
2 To Which School does the request ap		What is the number or general location of the issue?	1st fl
To Which School does the request ap		What is the number or general location of the issue?	front doors
To Which School does the request ap		What is the number or general location of the issue?	cafe doors
To Which School does the request ap		What is the number or general location of the issue?	outside door#6
To Which School does the request ap		What is the number or general location of the issue?	door 9
To Which School does the request ap		What is the number or general location of the issue?	
To Which School does the request ap	ply? Argenziano	What is the number or general location of the issue?	front door
To Which School does the request ap	ply? Argenziano	What is the number or general location of the issue?	door#9
To Which School does the request ap		What is the number or general location of the issue?	kitchen
To Which School does the request ap		What is the number or general location of the issue?	rm 306
To Which School does the request ap	ply? Argenziano	What is the number or general location of the issue?	313 and 315
To Which School does the request ap		What is the number or general location of the issue?	cafe doors
To Which School does the request ap	ply? Argenziano	What is the number or general location of the issue?	1st fl
To Which School does the request ap		What is the number or general location of the issue?	1st fl
To Which School does the request ap	Carlotter and Street, and Stre	What is the number or general location of the issue?	stairwell #4
To Which School does the request ap		What is the number or general location of the issue?	Stairwell #4 - Handrail on 2nd floor landi
To Which School does the request ap		What is the number or general location of the issue?	1 floor
To Which School does the request ap	Market Street St	What is the number or general location of the issue?	cafeteria door
To Which School does the request ap		What is the number or general location of the issue?	gym
To Which School does the request ap		What is the number or general location of the issue?	IT room - 311
To Which School does the request ap		What is the number or general location of the issue?	gym
To Which School does the request ap	Carlotte Carlotte Commencer	What is the number or general location of the issue?	1st fl
To Which School does the request ap		What is the number or general location of the issue?	3rd flr celling in stairway # 2
		What is the number or general location of the issue?	custodian's office
To Which School does the request ap To Which School does the request ap		What is the number or general location of the issue?	wall outside custodian's office

	Α	В	С	D	E	F		G	T	H	
57	3/31/2010	<b>DPW-School Buildings</b>	DPW-B&G	176404	RUDOLPH, DOROTHY		3 290	WASHINGTON ST	Y		Leaks have been detected in the following area:
58	3/30/2010	DPW-School Buildings	DPW-B&G	176312	RUDOLPH, DOROTHY		3 290	WASHINGTON ST	Y		Network Demarcation IDF #N101 Water leaking
59	3/30/2010	<b>DPW-School Buildings</b>	DPW-B&G	176313	RUDOLPH, DOROTHY		3 290	WASHINGTON ST	Y		Room 304 - new stains on ceiling
60	3/30/2010	DPW-School Buildings	DPW-B&G	176314	RUDOLPH, DOROTHY		3 290	WASHINGTON ST	Y		Door 10 - water damage/ mold Leaks around po
61	3/30/2010	DPW-School Buildings	DPW-B&G	176315	RUDOLPH, DOROTHY		3 290	WASHINGTON ST	Y		Gym - back corner-water seeping through caulk
62	3/30/2010	<b>DPW-School Buildings</b>	DPW-B&G	176317	RUDOLPH, DOROTHY		3 290	WASHINGTON ST	Y		Cafeteria doors/walls water seeping in - floor m
63	3/30/2010	DPW-School Buildings	DPW-8&G	176318	RUDOLPH, DOROTHY		3 290	WASHINGTON ST	Y		Window Frame 2nd floor above Cafetorium - w:
64	1/13/2010	<b>DPW-School Buildings</b>	DPW-B&G	171262	BOYLE, GERALD		3 290	WASHINGTON ST	Y		Installation of two (2) Play Area regulations/schi
65	1/5/2010	DPW-School Buildings	DPW-B&G	170543	KINDER, GRETCHEN		3 290	WASHINGTON ST	Υ		By no later than 1/13/10, please ask DPW to ins-

S	Т	U	
57 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	Near red refriggerator (133)
58 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	Network Demarcation IDF #N101
59 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	rm 304
60 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	door 10
61 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	gym
62 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	cafe
63 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	2nd floor
64 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	see below
65 To Which School does the request apply?	Argenziano	What is the number or general location of the issue?	2nd floor overhang

COMMONWEALTH OF MASSACHUSETTS

## THE SUPERIOR COURT

MIDDLESEX, ss.

**DOCKET No. 13-CV-1105-F** 

EDWARD RODRIGUEZ AS FATHER
AND NEXT FRIEND OF RODRIGO RODRIGUEZ

v.

## CITY OF SOMERVILLE

## MEMORANDUM OF DECISION AND ORDER

The defendant City of Somerville has filed motion to dismiss alleging that the plaintiff has failed to comply with the presentment requirements set forth in G.L. c. 258, section 4. After reviewing the moving and opposition papers and a hearing, this motion must be **DENIED** for the following reasons.

The City is correct that the letter dated May 11, 2011 sent by the plaintiff's attorney to the Mayor of Somerville in behalf of the child Rodrigo Rodriguez was hardly a model of precision. It notifies the city Mayor that a child was hurt while he was leaving school on April 14, 2011 when a metal frame fell off the front door and hit the child in the head. It requested a copy of any reports on the matter as well as any prior reports relating to the alleged defective door frame. Notably, it did not state that it was a presentment letter or was seeking relief under G.L. 258, the state tort claims act. It would have been far clearer - and indeed easier - had it done so. Such words would have been easy to add - and the plaintiff offers no comprehensible explanation for the obvious failure to do so. Instead, now, after the statutory two-year presentment window has closed (*i.e.*, on April 14, 2013), it claims that the April 14<sup>th</sup>, 2011 letter satisfies the standard; it does, but barely.

The letter satisfies the statute because it identifies the claimant, was sent to a proper official at the city, details the location of the incident, and claims that the law firm is representing the child with regard to injuries he sustained "while he was exiting the school when the metal frame on the door fell off and hit him on the head." The basis for the legal claim is obvious: metal frames should not fall off a school house door and strike children in the head. The city cannot plausibly state it did not know what the child's claim was about. It is further obvious that the

talismanic word "negligence" need not be employed; this is obvious from the facts alleged.

Nevertheless, plaintiff's counsel would be well advised in the future, if he wishes to avoid creating a needless legalistic issue, to call a presentment letter that which it is, on its face.

## **ORDER**

For these reasons, the defendant City's motion to dismiss must be **DENIED**.

BY THE COUR

DENNIS J. CURRAN Associate Justice

June 19, 2013

## COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT DEPARTMENT AT WOBURN C.A. No. 2013-01105-F

EDGAR RODRIGUEZ, as father and next friend of RODRIGO RODRIGUEZ, Plaintiff,

v.

CITY OF SOMERVILLE, Defendant.

NOTICE OF APPEAL

Notice is hereby given that the Defendant, CITY OF SOMERVILLE hereby appeals to the Appeals Court from the Memorandum of Decision and Order entered on June 19, 2013, denying the Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, pursuant to the doctrine of present execution. Denial of a motion to dismiss "predicated on the immunity provisions of G.L. c. 258 is immediately appealable under the doctrine of present execution." <u>Daveiga v. Boston Pub. Health Comm'n</u>, 449 Mass. 434, 435 n.2 (2007). Defendant's motion to dismiss asserted that because Plaintiff failed to make proper presentment under MGL c. 258, s. 4, its negligence claim was barred.

Respectfully submitted,

CITY OF SOMERVILLE By its attorney,

Jason D. Grossfield Assistant City Solicitor City Hall, Law Department 93 Highland Avenue Somerville, MA. 02143 (617) 625-6600, ext. 4400 BBO# 666122 FILED
INTHEOPPICE OF THE
CLERK OF COURTS
FOR THE CALLETTY OF MARKESEX
JUL 16 2013

## jgrossfield@somervillema.gov

## CERTIFICATE OF SERVICE

This certifies that on July 16, 2013, a true copy of the above document was mailed, postage prepaid, to Robert E. Mazow, Esq., Mazow McCullough, 10 Derby Square, 4<sup>th</sup> Floor, Salem, MA 01970.

Jason D. Grossfield Assistant City Solicitor COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT C.A. No. MICV2013-01105-F

EDWARD RODRIGUEZ as father and next friend of RODRIGO RODRIGUEZ, Plaintiff,

v.

CITY OF SOMERVILLE, Defendant.

ANSWER OF DEFENDANT CITY OF SOMERVILLE

Now comes defendant, City of Somerville, and answers the plaintiff's Complaint as

## follows:

- 1. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1.
- Defendant admits the allegations contained in paragraph 2 to the extent it is a municipal corporation with said address. Defendant admits it is the owner of said school. To the extent the balance asserts a legal conclusion, no response is required. Otherwise, denied.

Defendant repeats and realleges its answers to paragraphs 1 through 2 above and incorporates them herein by reference.

## COUNT I: Negligence

- 3. Admitted to the extent this paragraph refers to the minor Plaintiff. Otherwise, denied.
- 4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.

- 5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5.
- 6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6.
- 7. Paragraph asserts a legal conclusion to which no response is required.
- 8. Denied.
- 9. Denied.
- 10. Denied.
- 11. Denied.
- 12. Denied.

## THE FOLLOWING DEFENSES ARE SET FORTH WITHOUT IN ANY WAY WAIVING THE PRECEDING DEFENSE.

### FIRST DEFENSE

The plaintiff has failed to state a claim upon which relief can be granted.

## SECOND DEFENSE

The defendant, City of Somerville, is a municipal corporation and its liability, if any, is limited by statute.

## THIRD DEFENSE

If the Plaintiff sustained injuries as alleged in the Plaintiff's Complaint, then the said injuries were caused by the Plaintiff's own negligence, which negligence was greater than the Defendant's negligence, and therefore the Plaintiff is not entitled to recover.

## FOURTH DEFENSE

The Plaintiff has not given the Defendant due notice of the time, place and cause of the accident alleged to have caused the Plaintiff's injuries and of the name and place of residence of the person injured.

## FIFTH DEFENSE

The Defendant, City of Somerville, asserts that the Plaintiff has failed to provide notice within the period required by G. L. c. 84, § 18.

## SIXTH DEFENSE

This action has not been commenced within the applicable time limit, and therefore this action is barred by the Statute of Limitations.

### SEVENTH DEFENSE

At the time and place alleged in Plaintiff's Complaint, the Plaintiff so carelessly and negligently conducted himself that she by her own negligence contributed directly and proximately to her own alleged injuries and damages.

#### EIGHTH DEFENSE

If the Plaintiff sustained injuries as alleged in the Plaintiff's complaint, then said injuries were caused by the acts or omissions of persons or entities over whom the Defendant had no control and for whose conduct the Defendant is not legally responsible.

## **NINTH DEFENSE**

The defect, if any, alleged in the Plaintiff's Complaint was open and obvious.

### TENTH DEFENSE

The Defendant denies each and every allegation of the Plaintiff's Complaint except as specifically admitted above.

### **ELEVENTH DEFENSE**

By way of affirmative defense, the Defendant says that the Plaintiff is not entitled to recover because of her failure to mitigate damages.

## TWELTH DEFENSE

The Plaintiff voluntarily assumed the risk of damages incident to the doing of things in which the Plaintiff was engaged. Such damages as were sustained by the Plaintiff were the results of hazards, risks, and dangers ordinarily incident of the performance of the activities being engaged in by the Plaintiff.

## THIRTEENTH DEFENSE

The Plaintiff was guilty of contributory negligence and the damages, if any, recovered by the Plaintiff from the Defendant should be reduced in proportion to the said negligence of the Plaintiff in accordance with G. L. c. 231, § 85.

## FOURTEENTH DEFENSE

The defendant is not liable pursuant to the immunities set forth in G.L. c. 258, § 10.

#### FIFTEENTH DEFENSE

The plaintiff, failed to give the defendant proper notice of his injuries and claims as required by law, and his action is therefore, barred.

#### SIXTENNTH DEFENSE

The negligence of the plaintiff contributed in some degree to the cause of the accident, and his damages, if any, should be reduced and diminished in accordance with the law.

### JURY DEMAND

The Defendant demands trial by jury of all jury issues.

WHEREFORE, the defendant, City of Somerville, denies that the plaintiff is entitled to judgment against it and respectfully requests that this Court enter judgment in favor of the defendant, City of Somerville, dismiss the plaintiff's Complaint, and award the defendant, City of Somerville, its reasonable attorneys fees and costs incurred in the defense of this action.

CITY OF SOMERVILLE, By its attorney,

Jason D. Grossfield Assistant City Solicitor Law Dept., City Hall 93 Highland Avenue Somerville, MA 02143 (617) 625-6600, ext. 4400

BBO# 666122

jgrossfield@somervillema.gov

## CERTIFICATE OF SERVICE

Dated: July 16, 2013

This certifies that on July 16, 2013, I served the foregoing by first class mail, postage prepaid, on counsel of record: Robert E. Mazow, Mazow/McCullough, 10 Derby Square, 4<sup>th</sup> Floor, Salem, MA 01970.

Jason D. Grossfield Assistant City Solicitor